(1)

Supreme Court, U.S.
FILED
SEP 13 2005
OFFICE OF THE CLERK

No. 05-184

IN THE
Supreme Court of the United States

SALIM AHMED HAMDAN,
Petitioner,

v.

DONALD H. RUMSFELD, ET AL.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

---

REPLY BRIEF FOR PETITIONER

Lieutenant Commander
Charles Swift
Office of
Military Commissions
1931 Jefferson Davis Hwy.
Suite 103
Arlington, VA 22202
(703) 607-1521

Neal K. Katyal
Counsel of Record
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9000

Benjamin S. Sharp
Harry H. Schneider, Jr.
Joseph M. McMillan
Kelly A. Cameron
David R. East
Charles C. Sipos

PERKINS COIE LLP
607 14th St., NW
Washington, DC 20005
(202) 628-6600

Date: September 12, 2005

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D. C. 20001

CONTENTS

Reply Brief of Petitioner 1
REPLY APPENDIX A 1a
REPLY APPENDIX B 7a
REPLY APPENDIX C 11a
REPLY APPENDIX D 18a
REPLY APPENDIX E 25a
REPLY APPENDIX F 46a
REPLY APPENDIX G 48a
REPLY APPENDIX H 50a
REPLY APPENDIX I 52a
REPLY APPENDIX J 57a
REPLY APPENDIX K 59a
REPLY APPENDIX L 72a

TABLE OF AUTHORITIES

Cases

Arizona v. Fulminante, 499 U.S. 279 (1991) 7
Baker v. Carr, 369 U.S. 186 (1962) 5
Bates v. United States, 522 U.S. 23 (1997) 7
Beacon Theat. v. Westover, 359 U.S. 500 (1959) 4
Betts v. Brady, 316 U.S. 455 (1942) 7
Bowen v. Georgetown Univ. Hosp, 488 U.S. 204 (1988) 6
Bunting v. Mellen, 124 S. Ct. 1750 (2004) 3
Calder v. Bull, 3 U.S. 386 (1798) 6
Carmell v. Texas, 529 U.S. 513 (2000) 5
Duren v. Missouri, 439 U.S. 357 (1979) 4
Estelle v. Gamble, 429 U.S. 97 (1976) 7
Ex Parte Bollman,, 8 U.S. 75 (1807) 6
Ex Parte Milligan, 71 U.S. 2 (1866) 1, 2, 10
Ex Parte Quirin, 317 U.S. 1 (1942) ..... passim
Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) 1, 5
Helstoski v. Meanor, 442 U.S. 500 (1979) 3, 4
Holmes v. Jennison, 39 U.S. 540 (1840) 7
Hurtado v. California, 110 U.S. 516 (1884) 6
In re Sealed Case, 893 F.2d 363 (D.C. Cir. 1990) 4
Kaiser Aluminum v. Bonjorno, 494 U.S. 827 (1990) 6
Korematsu v. United States, 323 U.S. 214 (1944) 8
Land v. Dollar, 330 U.S. 731 7

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 6
Mazurek v. Armstrong, 520 U.S. 968 (1997) 2
Medellin v. Dretke, 125 S.Ct. 2088 (2005) 8
Murray v. The Charming Betsy, 6 U.S. 64 (1804) 10
New York ex. rel Bryant v. Zimmerman, 278 U.S. 63 (1928) 6-7
Norfolk Southern Railway v. Kirby, 125 S. Ct. 385 (2004) 2
Ogbudimkpa v. Ashcroft, 342 F.3d 207 (3d Cir. 2003) 9
Oliver v. United States, 466 U.S. 170 (1984) 7
Padilla v. Hanft, -- F. 3d – (4th Cir. Sept. 9, 2005) 1
Rasul v. Bush, 124 S. Ct. 2686 ..... passim
Reid v. Covert, 354 U.S. 1 (1957) 1
Rescue Army v. Mun. Court, 331 U.S. 549 (1947) 7
Rogers v. Tennessee, 532 U.S. 451 (2000) 6
Santa Fe Indus. v. Green, 430 U.S. 462 (1977) 7
Schlesinger v. Councilman, 420 U.S. 738 (1975) 3
Sell v. United States, 529 U.S. 166 (2003) 3
Solorio v. United States, 483 U.S. 435 (1987) 3, 7
Spencer v. Kemna, 523 U.S. 1 (1998) 8
Toth v. Quarles, 350 U.S. 11 (1955) 3
United States v. Ball, 163 U.S. 662 (1896) 8
United States v. Brown, 381 U.S. 437 (1965) 6
United States v. Myers, 635 F.2d 932 (2d Cir. 1980) 4

Wang v. Ashcroft, 320 F.3d 130 (2d Cir. 2003)..... 9, 10

Weaver v. Graham, 450 U.S. 24 (1981).....6

Treaties

Geneva Convention Relative to the Treatment of Prisoners of War (GPW), Art. 3 (Common Article 3), 6 U.S.T. 3316 (1949)..... 9, 10

Geneva Convention Relative to the Treatment of Prisoners of War (GPW), Art. 4(a), 6 U.S.T. 3316 (1949)..... 9, 10

Geneva Convention Relative to the Treatment of Prisoners of War (GPW), Art. 5, 6 U.S.T. 3316 (1949)..... 9, 10

Geneva Convention Relative to the Treatment of Prisoners of War (GPW), Art. 102, 6 U.S.T. 3316 (1949).....9

Rules

10 U.S.C. 821 10

10 U.S.C. 3037 9

Regulations

32 C.F.R. §9.5(p).....8

Army Reg. 190-8.....9

Other Authorities

Amicus Br. of Professors Martinez and Danner, *Hamdan v. Rumsfeld*, D.C. Cir., http://www.law.georgetown.edu/faculty/nkk/documents/dannermartinezamicus.pdf.....9

Department of Defense, Special Defense Department Briefing on Military

Commissions (Aug. 31, 2005), http://www.defenselink.mil/transcripts/2005/ tr20050831-3821.html 5

R. L. Stern, et al., *Supreme Court Practice* 161 (8th ed. 2002) 6, 7

Resp. Supp. Br., *Al Odah v. United States*, No. 05-5064, 05-5095 through 05-5116 ..... 8, 9

Robert Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 Yale L.J. 718 (1975) 4

U.S. Pet. Cert., *In re Cheney*, No. 03-475 4

William Blackstone, *Commentaries* 1

Respondents have done everything possible to avoid review of their military commissions—from contesting Petitioner's right to seek habeas relief, to holding trials at Guantanamo, to changing commission rules after trials have begun. These maneuvers only underscore the commissions' basic flaw: They are "built upon no settled principles," are "entirely arbitrary in [their] decisions," and are "in truth and reality no law." *Reid v. Covert*, 354 U.S. 1, 26 (1957) (plurality) (quoting William Blackstone, 1 *Commentaries* *413).

1. Petitioner faces a military commission, the first in over 50 years, that abandons tradition, the UCMJ, and the Geneva Conventions. At issue is whether the President can supersede established civilian and military judicial systems. "No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people..." *Ex parte Milligan*, 71 U.S. 2, 118-19 (1866). Over 600 law professors have argued that these commissions violate separation of powers and international law. Rep. App. 72a-103a. Despite disagreement on the merits, the district court and court of appeals found these collateral issues jurisdictional and did not abstain.

Trial will neither modify these critical structural issues nor permit their disappearance. They will inexorably recur. A record will not illuminate whether Congress' authorization of "*necessary and appropriate* force" authorizes this commission; nor will it illuminate the failure to provide Geneva Convention immunities. Trial will not settle whether the Court's detention decisions apply to this commission. *Compare* Pet. App. 6a (applying *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004)) with *Padilla v. Hanft*, - F. 3d - (Sept. 9, 2005), slip op., at 20 (suggesting detention is less harmful than trial).

A trial will shed no light on how *Milligan* and the explicitly circumscribed *Ex Parte Quirin*, 317 U.S. 1, 45-46 (1942) apply to human beings not alleged to have taken up arms against the U.S. *Compare Padilla*, slip op., at 11 (*Quirin* applicable because "like Hamdi, Padilla took up arms against United States forces in" Afghanistan) *with* Pet. App.

62a-67a (Hamdan's charge, unlike Hamdi and Padilla, which concerns civil-war conduct going back to 1996, but not taking up arms *against the U.S.*). The allegations against Hamdan are, at most, the same ones for which Lambdin Milligan was *convicted*. *Milligan*, 71 U.S., at 4-5, 27 (Milligan charged with "conspiring to seize munitions of war" and "joining and aiding...a secret society...for the purpose of overthrowing the Government" and "found guilty on all the charges"). For *Milligan* not to protect Hamdan would suggest that the Constitution does not protect human dignity, or the separation of powers, at Guantanamo—a conclusion at odds with *Rasul v. Bush*, 124 S. Ct. 2686, 2698 n.15 (2004). Pet. 15-16.

The lengthy delay occasioned by waiting for the shifting commission process to conclude–a delay that will preclude this Court from hearing another commission case for many years–strongly counsels for certiorari. Delay imposes severe hardships, to Hamdan, Rep. App. 59a-71a, and to the nation's vital interests. *E.g.*, Amicus Briefs filed by Retired Generals and Admirals, Chief Defense Counsel, and Human Rights First. The need for immediate review is no less now than it was in *Quirin* and other cases, Pet. 9-10; indeed, it is more.

2. An interlocutory posture is not a *jurisdictional* bar to certiorari. Nor is it a prudential bar, for reasons the Solicitor General articulated clearly in *United States v. Phillip Morris*, No. 05-92.[1] Respondents cite no authority applying any rule

---

[1] Respondents' *Phillip Morris* Petition, attached as Rep. App. A, fully refutes the claims they advance here:

"But the Court has recognized that 'there is no absolute bar to review of nonfinal judgments of the lower federal courts'.... See, *e.g.*, *Mazurek* v. *Armstrong*, 520 U.S. 968, 975 (1997)." *Id.*, at 23.

"The Court has not hesitated to review an interlocutory decision when 'it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.' Indeed, this Court has granted [interlocutory] review...innumerable times." *Id.*, at 24 (footnote and citations omitted, listing nine examples since 2000).

"[T]he issue presents a vitally important and recurring question that has major consequences for this important case." *Id.*, at 24.

"[T]he court of appeals would be unlikely to issue a decision until 2007. Under the best of circumstances, this Court would not receive a petition for writ of certiorari before the summer of 2007." *Id.*, at 25-26 & n.

"[T]his Court has repeatedly granted review of interlocutory court of appeals decisions in similar circumstances involving issues of far less significance...*Norfolk Southern Railway* v. *Kirby*, 125 S. Ct. 385 (2004)...,

against interlocutory review to military court cases, let alone commission or habeas challenges. On all scores, *Quirin*, the closest precedent, dictates that review should occur now. In the next closest precedent, *Solorio v. United States*, 483 U.S. 435 (1987), the Court rejected the same interlocutory objections urged by the Solicitor General here. Rep. App. 7a-10a. The questions presented are far graver than the service-connection test at issue in *Solorio*.[2]

a. This is not a criminal interlocutory appeal, as Respondents argue with respect to *every* other aspect of this trial. Pet. 30. The Petition challenges an *ad hoc* commission. It does not challenge courts-martial or civilian criminal systems, which are expressly authorized by Congress, time-tested, and subject to direct oversight by federal courts. Yet Respondents seek to harvest the benefit of rules from these fora. The panel itself rejected this logic, finding *Quirin*, not *Schlesinger v. Councilman*, 420 U.S. 738 (1975), the appropriate lens for viewing prudential doctrines like abstention. Respondents have even argued that the panel decided all issues with respect to commissions. Rep. App. 25a-45a. These judgments are final, not interlocutory. Returning to the district court serves no purpose. It is by no means clear that the panel's rulings can be revisited later, at any time.

Even if this were a typical case, strong reasons militate in favor of review. The court of appeals has already found the collateral-order doctrine applicable, recognizing that "setting aside the judgment after trial" would not address Mr. Hamdan's claims. Pet. App. 4a (citing *Abney v. United States*, 431 U.S. 651, 662 (1977)).[3] Hamdan asserts a right not

---

which involved narrow issues of maritime liability...Nevertheless, the Court granted review to decide – before the district court had determined petitioner's liability in the maritime contract dispute..." *Id.*, at 26-27 (footnote listing additional cases omitted).

[2] The Court has consistently recognized that military jurisdiction is harsh even at its best, and has therefore policed jurisdiction before trials begin. *E.g., Toth v. Quarles*, 350 U.S. 11 (1955).

[3] Like the Petitioners in *Helstoski* and *Abney*, Mr. Hamdan contends that he is immune from trial. Pet. App. 29a ("The government does not dispute the proposition that prisoners of war may not be tried by military tribunal."). Petitioner believes that the commission is not lawfully

to be tried. That right is irretrievably lost upon trial. *E.g.*, *Helstoski v. Meanor*, 442 U.S. 500 (1979) (examining pre-trial a defendant's immunity under Speech and Debate Clause). Just as ordinary concerns against interlocutory review are "not very persuasive as to the extremely small class of criminal cases brought against Members of Congress," *United States v. Myers*, 635 F.2d 932, 936 (2d Cir. 1980), they are not persuasive as to the first commission in a half-century.

Proceduralists in particular should reject Respondents' attempt to apply rules from conventional settings. Robert Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 Yale L.J. 718 (1975); *Duren v. Missouri*, 439 U.S. 357 (1979). Unlike judges, commission members lack independence and often do not explain their reasoning in opinions. Nor does the commission employ a jury–and encroachment on the jury function traditionally warrants interlocutory review. *E.g.*, *Beacon Theat. v. Westover*, 359 U.S. 500, 501 (1959) ("We granted certiorari because 'Maintenance of the jury as a fact-finding body is of such importance...that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'") (citations omitted). And Respondents do not defend their process against allegations by their own prosecutors that the commission was handpicked to ensure Hamdan's conviction and that exculpatory evidence would not be given to him. Unlike established systems, this type of trial record will obscure more than it illuminates. Pet. 28, 96a; Phillip Morris Pet. 26.

b. Not only are the most basic threshold questions–such as whether the Constitution and treaties even apply to these

---

authorized. Putting him in a trial will aggravate, not alleviate, these legal objections. *See Sell v. United States*, 539 U.S. 166, 176-77 (2003) (reviewing, interlocutorily, medication of defendant before trial because of "clear constitutional importance" and harm that would occur during trial); *Bunting v. Mellen*, 124 S. Ct. 1750, 1754 (2004) (Scalia, J., dissenting from denial of certiorari) (collateral issue review appropriate "to clarify constitutional rights without undue delay"); *In re Sealed Case*, 893 F.2d 363, 366-68 (D.C. Cir. 1990); U.S. Pet. Cert., *In re Cheney*, No. 03-475, at 23-24 ("Where, as here, the separation-of-powers arguments...are logically antecedent....it serves no purpose to require the President or Vice President to assert privilege claims before permitting an interlocutory appeal.").

trials–undecided by the Court; the rules for the trial are in constant flux. Respondents admit that they changed the rules a week before their brief was filed in this Court, just as they changed the rules on the eve of filing their briefs in *Padilla*, *Hamdi*, and *Rasul*. The commission now looks like none other in American history, rendering Respondents' reliance on *Quirin* even more untenable. With constantly shifting terms and conditions, the commissions resemble an automobile dealership instead of a legal tribunal dispensing American justice and protecting human dignity.[4]

The rule changes expose the central problem: the commission is not founded on law; it is a contrived system subject to change at the whim of the President. If he can change the rules this way today, he can change them back tomorrow, and then change them again the day after, with the Petitioner's life (and death-penalty eligibility) hanging in the balance. The President should not be allowed to "play ducks and drakes with the judiciary," *Baker v. Carr*, 369 U.S. 186, 268 (Frankfurter, J., joined by Harlan, J., dissenting). As *Carmell v. Texas*, 529 U.S. 513, 533 (2000) held, "[t]here is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes..."

If the rule of law means anything, it means that rules are

---

[4] For example, the new rule changes strip two of three commission members of their votes on legal questions. The Presiding Officer had previously tried to do this, but Hamdan objected, claiming it was illegal and prejudiced him. Reply App. 52a-56a. In 2004, the head of the commissions (the Appointing Authority) agreed, concluding that the President's Order identifies "only one instance in which the Presiding Officer may act on an issue of law or fact on his own." *Id.*, at 57a. The Secretary of Defense has now overruled the Appointing Authority, without notice or opportunity for comment. The members were stripped of their votes ten months *after* oral argument (but *before* their decisions) on multiple legal challenges to the commissions, raising additional suspicions about the monolithic rulemaking and prosecuting entity.

Respondents suggest Petitioner might not be excluded from the courtroom. However, as the district court found, the prosecution will exclude him for two days. Pet. App. 45a. Respondents suggest commission membership may change, but the Appointing Authority has already ruled that out, http://www.defenselink.mil/transcripts/2005/tr20050831-3821.html ("one more" member needed on Hamdan's case). In any case, the Presiding Officer would remain, not alleviating the problem.

known in advance, generally applied, and not subject to change, particularly after the presiding officer and factfinder have been empaneled. "Law is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or a particular case." *Hurtado v. California*, 110 U.S. 516, 535-36 (1884); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (a "government of laws, and not of men").[5] The Government's attempt to evade certiorari through herky-jerky late changes merely demonstrates the system's inherent instability and the constitutional need for immediate judicial review and legislation establishing rules.

c. This Court has not subjected habeas cases to its rules for interlocutory appeals. Had it done so, Respondents' leading precedent, *Quirin*, would not have been heard. Rather, "[i]n analyzing the finality of a judgment in a habeas corpus or prohibition proceeding, the Supreme Court has recognized that such proceedings are independent matters and that a final judgment rendered therein is reviewable regardless of the status of a related prosecution." R. L. Stern, et al., *Supreme Court Practice* 161 (8th ed. 2002). The Court's first foray into habeas in the national-security context, *Ex parte Bollman*, 8 U.S. 75 (1807), confirms this understanding.[6]

For example, when a defendant charged under a state

---

[5] *See Weaver v. Graham*, 450 U.S. 24, 29 n.10 (1981) ("The *ex post facto* prohibition also upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law"); *United States v. Brown*, 381 U.S. 437, 455 n.29 (1965); *Rogers v. Tennessee*, 532 U.S. 451, 460 (2001). The Court has been wary of retroactive changes. E.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988). They are "contrary to fundamental notions of justice," *Kaiser Aluminum v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring), in that they upset an accused's expectations and compromise crafting defense strategy. *Calder v. Bull*, 3 U.S. 386 (1798).

[6] The petitioners were charged with participating in a conspiracy to overthrow the U.S. That the petition was filed before trial had commenced was held irrelevant. As Chief Justice Marshall wrote, a "question brought forward on a habeas corpu[s] is always distinct from that which is involved in the cause itself...and therefore these questions are separated, and may be decided in different courts." 8 U.S., at 101. Although the Court knew the case might "excite and agitate the passions of men," it found a need to decide it, for "[w]hether this inquiry be directed to the fact or to the law, none can be more solemn, none more important to the citizen or to the government; none can more affect the safety of both." *Id.* at 125.

"anti-secret organization" statute brought a pre-trial habeas challenge to the statute's legality, the Court held that a habeas action "is quite unlike the fragmentary or branch proceeding . . . held to be interlocutory only," and that a habeas decision "refusing to discharge him is a final judgment in that suit and subject to review by this Court." *New York ex. rel Bryant v. Zimmerman*, 278 U.S. 63, 70-71 (1928). This rule "has been respected and given effect in an unbroken line of...decisions ...[and] followed in other cases," *id.* at 71; *Rescue Army v. Mun. Court*, 331 U.S. 549, 566-67 (1947) (rule "well settled"); *Holmes v. Jennison*, 39 U.S. 540, 564-65 (1840). Moreover, the prospect of renewal of a habeas petition does not deprive a judgment of finality. *Betts v. Brady*, 316 U.S. 455, 461 (1942).

d. This Court has regularly reviewed, over the objection of the Solicitor General, interlocutory criminal cases. *E.g., Bates v. United States*, 522 U.S. 23 (1997); *Solorio, supra*; *Oliver v. United States*, 466 U.S. 170 (1984). "[T]he interlocutory status of the case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." Stern, *supra*, at 260; *Estelle v. Gamble*, 429 U.S. 97, 103 (1976); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States v. Gen. Motors*, 323 U.S. 373, 377 (1945). This Petition presents the ultimate questions raised by Hamdan's case, and they have been fully decided below.

Furthermore, the Court has heard interlocutory appeals to resolve issues of importance to other cases. Stern, *supra*, at 259-60 (citing 18 cases); *Cent. Bank v. First Interstate Bank*, 511 U.S. 164, 170 (1994); *Santa Fe Indus. v. Green*, 430 U.S. 462 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). Respondents have argued that the decision below not only resolves all challenges to all commissions, but most all claims brought by the hundreds of Guantanamo detainees.[7]

---

[7] The questions presented are cleanly distinct from Petitioner's guilt or innocence, and concern the same matters that led the district court to enjoin Hamdan's commission. They do not concern an accidental "classic 'trial error,'" *Arizona v. Fulminante*, 499 U.S 279, 309 (1991), but rather the systemized and foreseeable denial of fundamental rights that amount to "structural defects in the constitution of the trial mechanism [itself], [and] which defy analysis by 'harmless-error' standards." *Id.*

e. Finally, prudential reasons to defer review do not apply, since federal jurisdiction has already been exercised to decide fundamental issues.[8] Unlike the ordinary case, where a panel decision might be questioned by another Circuit, this decision is the law of the nation. Denying certiorari freezes that law into place for years to come.

As such, Respondents' abstention argument militates in *favor* of certiorari. If prudence requires courts to stay silent, denying certiorari would leave in place a court of appeals' decision that is *anything but* silent. The many virtues of judicial inaction are not furthered by denying review of a case where the Government itself contends that the panel reached out improperly to decide key issues. *See Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).[9]

3. By overreading one footnote (in *Eisentrager*) and underreading another (in *Rasul*), the court of appeals created a legal black hole where no law applies. In this setting, individuals will not merely be *detained*, but tried and sentenced to life imprisonment and even death.

Respondents' characterizations of the panel's decision are belied by their own representations in *al Odah*, where they argued that *Hamdan* binds the court of appeals on

---

[8] At most, Respondents' claim militates in favor of granting the Petition while commission proceedings are underway, or for deferring its consideration until those proceedings conclude, not denying the writ altogether. *See* Stern, *supra*, at 311, 451; *Medellin v. Dretke*, 125 S. Ct. 2088, 2105 (O'Connor, J., dissenting). The statutory restrictions on review of state-court proceedings in *Medellin* are not applicable here. *Id.*, at 2090-92.

[9] Respondents' contention that the district court should have abstained is wrong and was properly rejected by both the court of appeals and district court. Pet. App. 3a, 23a; Hamdan Ct. App. Br. 8-31. Respondents' speculation that Petitioner may be acquitted does not diminish the need for this Court's immediate review. Issues of military-court jurisdiction are unique because an accused cannot secure the benefit of an acquittal. See *United States v. Ball*, 163 U.S. 662, 669 (1896) ("an acquittal before a court having no jurisdiction is, of course,...no bar to subsequent indictment and trial in a court which has jurisdiction of the offence."); Rep. App. 59a-71a.

Even if the Commission found Hamdan not guilty, the Appointing Authority and Review Board could send his case back. 32 C.F.R. §9.5(p). Commission rules permit Hamdan to be charged with another offense (such as conspiring to commit some other offense, or even aiding and abetting the very *same* object offenses for which he is currently charged). *Id. Cf. Spencer v. Kemna*, 523 U.S. 1, 18 (1998) ("capable of repetition, yet evading review"). As long as the Military Order stands, Respondents can bring new charges—and subject Hamdan to new trials—*ad infinitum*.

matters such as whether the Constitution and Geneva Conventions protect detainees at Guantanamo. Rep. App. 11a-24a. Furthermore, elaboration of *Rasul* is easier in a case involving criminal prosecution (with life imprisonment and the stigma of conviction at stake)--a context where the Constitution, UCMJ, and treaties provide far more rights. For example, GPW Arts. 3 and 102 speak of trial rights, as do many constitutional and UCMJ provisions. This Court's recognition of Petitioner's rights would not automatically extend to noncommission detainees. The *al Odah* cases involve myriad individuals of diverse citizenship, captured in a variety of conflicts. Before wading into them, the Court should provide guidance in a single, cleanly presented case.[10]

4. Unlike the court below, other circuits have held that the habeas statute permits treaties to be judicially enforced. *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 219 (3d Cir. 2003); *Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003). *Wang* did not rely on "rights created by a statute." Opp. Br. 20. The portion of *Wang* Respondents quote is a summary of a lawyer's argument, not its holding. *Wang* relied on the treaty, implemented in domestic law via statute, and used habeas to enforce it. 320 F.3d at 141 n.16. In this case, there is no dispute that the GPW has been implemented by AR 190-8,

---

[10] Respondents' brief is marred by numerous errors. First, some claims are wrong. The guilt phase of trial was not "one month" away; on the morning of the district court's ruling the Presiding Officer indicated that it was many months away. (To date, no discovery order has issued permitting access to inculpatory or exculpatory material.) Petitioner did raise 10 U.S.C. 3037 in his D.C. Circuit brief at pp. 15 and 63. Hamdan *does* challenge his detention, Habeas Pet., at 25. The claim that Petitioner will remain detained as an "enemy combatant" cannot be assumed given the pending appeal in *al Odah*. Conspiracy is not a stand-alone offense triable under the laws of war, see Amicus Br. of Professors Martinez and Danner, http://www.law.georgetown.edu/faculty/nkk/documents/dannermartinezamicus.pdf. Review in *Quirin* was not due to an "imminent execution," and the Government tellingly cites to nothing to support its claim. *Quirin* was heard before the verdicts, not before sentencing. 317 U.S. at 19-20.

Second, some claims contradict one another, such as the assertion that this case implicates the "most sensitive national security concerns," and the simultaneous claims that the number of commission cases is "small," Opp. Br., at 16, and Petitioner would be detained anyway, *id.*, at 13.

Third, some claims are simply incredible, such as the claim that Respondents fear the delay from certiorari, Opp. Br., at 16, in light of the near three-year delay in merely charging Petitioner. Rep. App. 68a.

and would be enforced under *Wang*'s rationale. Pet. 24-25.[11]

5. Common Article 3, on which the court below broke with the Second Circuit and was itself divided, provides yet another reason for certiorari. No vehicle problems exist; the panel fully reached the merits. As *amici* 304 Parliamentarians point out, even if the GPW is not judicially enforceable, this Court's elimination of the panel's merits holding is critical to vindicate diplomatic and military-enforcement mechanisms. Because the panel rested on statutes explicitly incorporating laws of war, 10 U.S.C. 821; *Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (1804), this case is an ideal vehicle to examine whether the GPW applies to the "war on terror."

6. Respondents' claims at pp. 27-29 are irrelevant. Petitioner does not dispute the existence of "armed conflict," the question is whether the resolution permitting "*necessary and appropriate force*" authorizes this commission, particularly when the panel found the laws of war inapplicable. *Milligan* requires applying the benefits, as well as the burdens, of the laws of war to defendants; under the panel's reasoning, no law exists for Hamdan to violate. Pet. 12-15.

CONCLUSION

Review would enable this Court to preserve a *status quo* that has existed for more than a half-century, and permits the Court to examine Respondents' revolutionary proposals before they indelibly alter the charter of American justice. In this unique setting, certiorari is the prudent course.

---

[11] Petitioner has consistently maintained that he is not a member of al-Qaeda or of any armed forces. Respondents do not allege that Petitioner engaged in hostilities; that is why Petitioner is protected under Art. 4(a)(4), which covers "[p]ersons who accompany the armed forces without actually being members thereof." Even if the CSRT labeled Hamdan an enemy combatant, a determination not in the record, he would be protected under Art. 4(a)(1). That article protects al-Qaeda members who were "militi[a] or volunteer corps forming part of" Taliban forces. For this reason, the Government told the district court that the CSRT had "zero effect" on the case, C.A. App. 250-51, but now, inconsistently, relies on it.

Petitioner need not fulfill the criteria of Art. 4(a)(2), as he explicitly argued below. Hamdan Ct. App. Br., 47-49. As the district court correctly found, the circumstances of his capture, his insistence upon innocence, and his claims to GPW protection establish "doubt" sufficient to require an Article 5 tribunal, and further resolution as to which specific subsection cannot take place until after that tribunal. Pet. App. 28a-32a.

RESPECTFULLY SUBMITTED,

Lieutenant Commander
Charles Swift
Office of
Military Commissions
1931 Jefferson Davis Hwy.
Suite 103
Arlington, VA 22202
(703) 607-1521

Neal K. Katyal
Counsel of Record
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9000

Benjamin S. Sharp
Harry H. Schneider
Joseph M. McMillan
Kelly A. Cameron
Charles C. Sipos
David R. East
PERKINS COIE LLP
607 14th St., NW
Washington, DC 20005
(202) 628-6600

September 12, 2005

APPENDICES

REPLY APPENDIX A

No. 05-92

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP MORRIS USA, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant to the Solicitor General

SHARON Y. EUBANKS
STEPHEN D. BRODY
FRANK J. MARINE
MARK B. STERN
ALISA B. KLEIN
MARK R. FREEMAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the district court's equitable jurisdiction to issue "appropriate orders" to "prevent and restrain" violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1964(a), encompasses the remedial authority to order disgorgement of illegally-obtained proceeds.

.....

II. THE INTERLOCUTORY CHARACTER OF THE COURT OF APPEALS' DECISION IN THIS INSTANCE WEIGHS IN FAVOR OF THIS COURT'S REVIEW

The United States has pointed out in numerous instances that the interlocutory character of a court of appeals' decision normally counsels against this Court's immediate review because the proceeding in the lower court may obviate the need for the Court's intervention. *See, e.g., Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967). But the Court has recognized that "there is no absolute bar to review of nonfinal judgments of the lower federal courts" and that the interlocutory character of a decision affects only the prudential calculus of whether certiorari should be granted. *See, e.g., Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (per curiam) (summarily reversing an interlocutory order). When "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Robert L. Stern et al., Supreme Court Practice 259 (8th ed. 2002). The Court has not hesitated to review an interlocutory decision when "it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co. v. Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893). Indeed, this Court has granted review of interlocutory court of appeals decisions, decided pursuant to 28 U.S.C. 1292(b), innumerable times.

[footnote] For a few recent examples, see, *e.g.*, *Cutter* v. *Wilkinson*, 125 S. Ct. 2113 (2005); *Norfolk S. Ry.* v. *Kirby*, 125 S. Ct. 385 (2004); *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004); *Gratz* v. *Bollinger*, 539 U.S. 244 (2003); *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1 (2003); *Breuer* v. *Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003); *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001); *Green Tree Fin. Corp.-Ala.* v. *Randolph*, 531 U.S. 79 (2000); *Harris Trust & Sav. Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238 (2000).

This case presents an instance in which the prudential considerations weigh heavily in favor of immediate review. The issue presented here-whether Section

1964(a) authorizes a court to grant the government the remedy of equitable disgorgement in a RICO action-plainly warrants this Court's review for the reasons already stated: (1) the divided court of appeals' resolution of that issue is inconsistent with the decisions of this Court and other courts of appeals (pp. 9-19, supra); and (2) and the issue presents a vitally important and recurring question that has major consequences for this important case (pp. 20-23, supra). The interlocutory character of the court of appeals' ruling on that issue should not preclude this Court's review where the interlocutory review process has produced an erroneous intermediate appellate court ruling that, if left undisturbed, would require the district court to fashion a remedy based on fundamentally mistaken principles of law.

The district court determined five years ago that Section 1964(a) allows equitable disgorgement, Pet. App. 117a-121a, and it certified its May 24, 2004, order, despite the government's objection, for the limited purpose of obtaining guidance on whether the so-called "Carson standard" for disgorgement applies to this case. See id. at 148a-153a. Over a forceful dissent, the court of appeals panel majority elected to go beyond the narrow issue that prompted the district court to certify its order. See id. at 37a-49a, (Tatel, J., dissenting); see note 1, supra. Indulging respondents' "questionable tactics" (id. at 48a), the divided court reached out to decide an issue unnecessarily and contrary to the decisions of this Court, other courts of appeals, and the court of appeals' own precedent. See pp. 9-19, supra.

That unwarranted and badly mistaken decision-which the en banc court left unreviewed following a tie vote on whether to grant rehearing-will impair, rather than advance, the ultimate resolution of this case. The district court certified its order for interlocutory review to address the applicability of the Carson standard, which that court discerned to provide a "substantial ground for difference of opinion." See Pet. App. 151a (emphasis omitted). The court of appeals majority instead reached out to address an issue-the availability of disgorgement-over which the district court and the courts of appeals were heretofore in agreement. If the Court postpones correction of the court of appeals' mistaken guidance until after the district court issues an artificially constrained final judgment and this complex case traces a new route through the court of appeals, then the

district court will be precluded from correctly resolving this litigation until remand proceedings can be convened at a far distant date.

[footnote] Under the current schedule, post-trial briefing will not be completed until October 2005. See Order #964-A (June 10, 2005). The district court could conceivably issue a final decision by early 2006, but even if the court of appeals undertook expedited review, the briefing in the court of appeals would likely not be completed until the summer of 2006. Given the massive record in this case, the court of appeals would be unlikely to issue a decision until 2007. Under the best of circumstances, this Court would not receive a petition for writ of certiorari before the summer of 2007. If the Court granted the petition, it could not reasonably be expected to issue a decision until 2008. Under this optimistic projection, remand proceedings would be unlikely to commence until late 2008 at the earliest. In light of the daunting burden the district court would face in recommencing proceedings three or more years from now in this complex six-year-old case, the Court should resolve the correctness of the court of appeals' interlocutory guidance during its 2005 Term so that the district court can issue a final decision—relying on this Court's definitive guidance—by the summer of 2006.

The district court has not yet rendered a ruling on liability in this case, but respondents have no basis for expecting a favorable outcome. The government has put forward a powerful liability case, see note 7, supra, and the district court has provided no indication that the government has failed to carry its burden of proof. In any event, this Court has repeatedly granted review of interlocutory court of appeals decisions in similar circumstances involving issues of far less significance. For example, the Court recently reviewed an interlocutory court of appeals decision addressing remedial issues in advance of a liability determination in *Norfolk Southern Railway v. Kirby*, 125 S. Ct. 385 (2004). That case, which involved narrow issues of maritime liability affecting a limited number of carriers, involved matters of far less pressing public importance than the issue involved here. Nevertheless, the Court granted review to decide-before the district court had determined petitioner's liability in the maritime contract dispute -whether petitioner was entitled to the protection of potential contractual liability limitations. See id. at 392.

[footnote] The Court followed the same practice in *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199 (1996), granting review to determine, in advance of a liability determination, whether certain state law remedies remain available to a personal injury claimant in a maritime wrongful-death suit. See *id.* at 204. The Court also followed that practice in *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122 (1989), granting review, in advance of a liability determination, to determine whether the Warsaw Convention's limitation on damages for passenger death applies despite the defendant's failure to provide adequate notice of the limitation. See *id.* at 124. Similarly, the Court decided a case concerning the availability of an innocent-owner defense in a civil forfeiture action where the claimant, on remand, could also defeat forfeiture by rebutting the finding of probable cause. *United States* v. *92 Buena Vista Ave.*, 507 U.S. 111 (1993). Each of these cases reached the Court after the respective court of appeals rendered a decision through the interlocutory procedure set out in 28 U.S.C. 1292(b). See *Kirby*, 125 S. Ct. at 392; *Yamaha*, 516 U.S. at 204-205; *Chan*, 490 U.S. at 124-125; *92 Buena Vista Ave.*, 507 U.S. at 116.

In short, this case warrants the Court's attention at this critical juncture of the litigation. The court of appeals' mistaken interlocutory guidance not only presents an obstacle, rather than an aid, to the ultimate termination of the litigation, but it stands as a mistaken precedent that will continue to misdirect other courts and constrain the government's ability to seek full relief in future civil RICO cases. As the court of appeals panel itself acknowledged, its decision has created a circuit conflict, and the court of appeals' inability to decide the issue en banc ensures that the conflict will persist until this Court resolves it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

EDWIN S. KNEEDLER*
Acting Solicitor General
PETER D. KEISLER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General
SHARON Y. EUBANKS
STEPHEN D. BRODY
FRANK J. MARINE
MARK B. STERN
ALISA B. KLEIN
MARK R. FREEMAN
Attorneys

* The Solicitor General is disqualified in this case.

REPLY APPENDIX B

In the Supreme Court of the United States
October Term, 1985

Richard Solorio, Petitioner
v.
United States of America

On Petition for a Writ of Certiorari to the United States Court of Military Appeals

BRIEF OF THE UNITED STATES IN OPPOSITION

Charles Fried
Solicitor General
Department of Justice
Washington, D.C. 20530

...

The decision of the Court of Military Appeals is correct, it does not conflict with any decision of this Court, and it involves a jurisdictional issue that has no impact beyond the military justice system. Furthermore, petitioner's contentions are not ripe for this Court's review : petitioner's convictions have not yet been reviewed on direct appeal, and one of the questions in the petition was not raised in any of the lower courts. For these reasons, review by this Court is not warranted.

1. This case is currently in an interlocutory posture. The Court of Military Appeals rendered its decision on a government appeal from the trial judge's dismissal of the charges against petitioner. Following that court's decision, petitioner was convicted and sentenced. Petitioner's sentence includes a term of confinement in excess of six months and a bad conduct discharge. If that sentence is upheld by the convening authority (see Art. 60, UCMJ, 10 U.S.C. (& Supp.

II) 860), petitioner's convictions and sentence will be reviewed by the Coast Guard Court of Military Review under Article 66 of the UCMJ, 10 U.S.C. (& Supp. II) 866. If that court rules against him, petitioner will again be able to seek review by the Court of Military Appeals under Article 67 of the UCMJ, 10 U.S.C. (& Supp. II) 867. Because a favorable decision by either court below on petitioner's pending appeal may render moot the claims that he has raised in his petition, review by this Court at this time would be premature.

The record on petitioner's appeal from the judgment of conviction also provides a more complete factual background against which to consider the claims presented in the petition. Contrary to petitioner's assertion (Pet. 20), the trial on the merits has produced additional facts that are relevant to the issue of jurisdiction.' Accordingly, on petitioner's upcoming appeal, the Court of Military Review will be able to apply its expertise to the more complete factual record of the case, so as to present a better record for subsequent review. See Schlesinger v. Councilman, 420 U.S. 738, 760 (1975) (noting that whether an offense is subject to prosecution by court-martial is a "matter[] as to which the expertise of military courts is singularly relevant") ; see also id. at 760-761 n.34. There is therefore no need for this Court to decide the claims presented by petitioner in the current posture of this case.

Petitioner maintains (Pet. 19) that review by this Court is necessary at this time because a service-member defendant may petition for a writ of certiorari only from a judgment of the Court of Military Appeals. Petitioner contends that his opportunity to seek review by this Court will be frustrated if the Court of Military Appeals declines to re-view his case again. That claim, however, is not persuasive.

When Congress gave this Court certiorari jurisdiction in military cases, it gave the Court jurisdiction to review only the judgments of the Court of Military Appeals, and not the courts of military review. Congress restricted this Court's jurisdiction in that fashion to ensure that the cases coming to this Court would be only those involving issues of

substantial national importance. See S. Rep. 98-53, 98th Cong., 1st Sess. 8-11, 33-34 (1983); H.R. Rep. 98-549, 98th Cong., 1st Sess. 16-17 (1983). If the Court of Military Appeals were to decline to review petitioner's case following the affirmance of his conviction, it would put petitioner in precisely the same position as if the court of military review had ruled against him in the first instance and the Court of Military Appeals had declined to review that ruling. The fact that the Court of Military Appeals has a screening function that is designed to limit the number of military cases reaching this Court should not provide a justification for relaxing the usual principles counseling against review of interlocutory decisions.

5. We are informed that, for example, additional evidence of the impact of the offenses on the victims' families, which the Court of Military Appeals considered significant (Pet. App. 10a-12a), was developed during the trial testimony of the victims' mothers, who did not appear at the pretrial hearing. It was also revealed during the trial that one of the victims had considered suicide

In any event, the Court of Military Appeals has been sensitive to the fact that it must grant review before a defendant may seek review in this Court. Consistent with congressional concern as to the role that it plays in the process (S. Rep. 98-53, supra, at 34), the Court of Military Appeals has in some cases granted review and summarily affirmed on the basis of its own longstanding precedents that have never been reviewed by this Court, apparently in order to allow the defendant to seek review in this Court.

See, e.g., United States v. Spicer, 20 M.J. 188 (1985), cert. denied, No. 84-1978 (Oct. 21, 1985) ; United States v. Simmons, 21 M.J. 38 (1985), cert. denied, No. 85-857 (Feb. 24, 1986) United States v. Holman, 21 M.J. 149 (1985), cert. denied, No. 85-963 (Jan. 13, 1986).

Moreover, the decision by the Court of Military Appeals not to review petitioner's case would not prevent him from obtaining review of his claims by a federal court. Petitioner can collaterally attack his convictions by filing a petition for

a writ of habeas corpus in federal district court, as Congress recognized when it limited direct review in this Court from the judgments of the military courts. See S. Rep. 98-53, supra, at 32-33.

On the merits, petitioner's claims do not warrant further review. The courts below correctly applied this Court's decisions to the facts of this case, and petitioner has not presented any sufficient reason to justify further review.

The Constitution (Art. I, § 8, Cl. 14) empowers Congress to provide for the court-martial of service-men for committing crimes. Whether an individual serviceman may be tried by a court-martial for a particular crime turns on whether, on the facts of the case, the offense and the underlying conduct sufficiently affect the interests of the military as to be "service-connected." Councilman, 420 U.S. at 760; Relford v. Commandant, 401 U.S. 355, 365-369 (1971); O'Callahan v. Parker, 395 U.S. 258 (1969). That inquiry requires a court to gauge "the impact of an offense on military discipline and effectiveness, * * * whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and * * * whether the distinct military interest can be vindicated adequately in civilian courts." Councilman, 420 U.S. at 760. This undertaking involves "matters of judgment that often turn on the precise set of facts in which the offense has occurred," as to which "the expertise of military courts is singularly relevant" (ibid.). See also Relford, 401 U.S. at 365-366 (adopting "an ad hoc approach to cases where a trial by court-martial is challenged). The ruling below that petitioner can be tried by a court-martial is consistent with these principles...

REPLY APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5064, 05-5095 through 05-5116

KHALED A.F. ~~AL ODAH, et~~ al., Petitioners-Appellees/Cross-Appellants,

v.

UNITED STATES OF AMERICA, et al., Respondents-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR THE UNITED STATES, ET AL.

The United States submits this supplemental brief in response to this Court's order of July 26, 2005, which directed the government to file a brief "addressing the effect of this court's opinion in Hamdan v. Rumsfeld, No. 04-5393 (D.C. Cir. July 15, 2005)." Hamdan significantly undercuts the claims advanced by petitioners in this case. Specifically, it bolsters our argument that the Due Process Clause of the Fifth Amendment is inapplicable to aliens captured abroad and held at Guantanamo Bay, Cuba. In addition, Hamdan forecloses petitioners' Geneva Convention claims altogether by holding that the Geneva Convention does not create judicially enforceable rights, and its rationale is fully applicable to petitioners' other treaty-based claims. Finally, Hamdan bars petitioners' claims based on Army regulations relating to the treatment of detainees.

STATEMENT

In Hamdan v. Rumsfeld, __ F.3d __ , 2005 WL 1653046, No. 04-5393 (D.C. Cir. July 15, 2005), this Court

upheld the legality of the use of military commissions to try alien enemy combatants for violations of the laws of armed conflict. Hamdan himself, who served as the personal driver for Osama bin Laden and other high ranking al Qaeda members and associates, was captured during military operations in Afghanistan and was transferred to a detention facility at Guantanamo Bay, Cuba. In July 2003, the President issued a finding that "there is reason to believe that [Hamdan] was a member of al Qaeda or was otherwise involved in terrorism directed against the United States," and designated Hamdan for trial by military commission. Slip op. 4. In July 2004, Hamdan was charged with conspiracy to commit the offenses of attacking civilians, attacking civilian objects, murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent, and terrorism.

Hamdan filed a petition for a writ of habeas corpus in federal district court to challenge the commission proceedings. The district court granted the petition in part. Invoking various provisions of the Third Geneva Convention, that court enjoined the ongoing military commission proceedings against Hamdan and ordered him released to the general detention population at the Guantanamo Bay Naval Base.

This Court reversed. It held that the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), among other provisions, "authorized the military commission that will try Hamdan." Slip op. 9. It further held that the district court had erred in determining that the Third Geneva Convention creates judicially enforceable rights, see slip op. 10-13, and that members and affiliates of al Qaeda qualify for prisoner-of-war status under the Geneva Convention, see slip op. 13-14. Next, this Court stated that, contrary to Hamdan's argument, the Supreme Court's decision in Rasul v. Bush, 124 S. Ct. 2686 (2004), considered only the "'narrow' question" of the scope of statutory habeas jurisdiction, and the fact "[t]hat a court has jurisdiction over a claim does not mean the claim is valid." Slip op. 11, 13. And it held that military commissions need not follow the procedural rules laid out for courts-martial in the Uniform Code of Military Justice. See slip op. 17-18.

ARGUMENT

I. Hamdan undermines petitioners' claims based on the Due Process Clause of the Fifth Amendment.

As we explained in our opening brief, petitioners' constitutional claims lack merit because the Due Process Clause is inapplicable to aliens captured abroad and held at Guantanamo Bay, Cuba. See Opening Brief for the United States 15-29. Both the Supreme Court and this Court have been "emphatic" in rejecting "the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990); see also Johnson v. Eisentrager, 339 U.S. 763, 781-85 (1950). Under Eisentrager, the applicability of the Fifth Amendment turns on whether the United States is sovereign over a territory, not whether it merely exercises control there. See id. at 778; see also Verdugo, 494 U.S. at 269.

Petitioners do not contend that the United States is sovereign at Guantanamo Bay, but instead rely on an expansive reading of the Supreme Court's decision in Rasul v. Bush, 124 S. Ct. 2686 (2004). In Rasul, the Court held that jurisdiction under the habeas statute extends to claims brought by detainees at Guantanamo Bay. Petitioners attach dispositive significance to a footnote in Rasul stating that their allegations "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. § 2241(c)(3)." 124 S. Ct. at 2698 n.15. In their view, this footnote implicitly overruled the Fifth Amendment holdings of Eisentrager and its progeny.

Hamdan undermines petitioners' implausible reading of Rasul. In Hamdan, this Court explained that Rasul addressed only the scope of statutory habeas jurisdiction, leaving Eisentrager's substantive holdings intact. As the Court stated, Rasul decided a "'narrow' question: whether federal courts had jurisdiction under 28 U.S.C. § 2241 `to consider challenges to the legality of the detention of foreign nationals' at Guantanamo Bay." Slip op. 11 (quoting Rasul, 124 S. Ct. at 2690). The Court further stressed: "That a court has jurisdiction over a claim does not mean that the claim is valid. See Bell v. Hood, 327 U.S. 678,

682-83 (1946)." Slip op. 13; compare Opening Brief for the United States 24 (citing Bell for the proposition that "[t]o say that these allegations are sufficient for jurisdictional purposes, a reading of footnote 15 strongly suggested by context, establishes only that they are not `wholly insubstantial' or `frivolous' on the merits"). Thus, Hamdan supports our argument that Rasul did not alter the established principle that the Fifth Amendment is inapplicable to aliens who are outside the sovereign territory of the United States.

II. Hamdan forecloses petitioners' claims under the Third Geneva Convention, and significantly weakens their other treaty-based claims.

In Hamdan, this Court squarely held that the Third Geneva Convention does not create judicially enforceable rights. See slip op. 13 ("We therefore hold that the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court."). It also rejected the argument, advanced by petitioners here, see Appellees' Brief 62-64, that the habeas statute permits courts to enforce treaty rights that otherwise would not be judicially enforceable. See slip op. 13 ("The availability of habeas may obviate a petitioner's need to rely on a private right of action . . . but it does not render a treaty judicially enforceable."). These holdings are binding on this panel and are dispositive of petitioners' claims under the Third Geneva Convention.

Moreover, even if the Convention were judicially enforceable, alternative holdings in Hamdan would foreclose petitioners' claims on the merits. Hamdan held that the Convention does not apply to al Qaeda and its members, since that organization is not one of the "High Contracting Parties" to the Convention. Slip op. 14. Nor could Hamdan qualify for prisoner-of-war status as "a member of a group" that meets the requirements of Article 4(A)(2) of the Convention-requirements that include displaying "a fixed distinctive sign recognizable at a distance" and conducting "operations in accordance with the laws and customs of war." Ibid. The President has determined that neither al Qaeda detainees nor Taliban detainees qualify for prisoner-of-war status, see Addendum to Opening Brief for the

United States 9a-10a, and petitioners do not, and could not, challenge that manifestly correct foreign-policy judgment of the Commander-in-Chief These holdings in Hamdan therefore provide alternative bases for rejecting petitioners' Geneva Convention claims.

Petitioners have also asserted claims under treaties other than the Third Geneva Convention, including the Fourth Geneva Convention, see Appellees' Brief 70, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, see id. at 71, the Convention for Elimination of the Worst Forms of Child Labor, see ibid, and the International Covenant on Civil and Political Rights, see id. at 72 n.65. Hamdan's reasoning undermines all of these claims. Hamdan explained that "this country has traditionally negotiated treaties with the understanding that they do not create judicially enforceable individual rights." Slip op. 10. That is because, "[a]s a general matter, a `treaty is primarily a compact between independent nations,' so "[i]f a treaty is violated, this `becomes the subject of international negotiations and reclamation,' not the subject of a lawsuit." Ibid. (quoting Head Money Cases, 112 U.S. 580, 598 (1884)). Therefore, "' [i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.'" Ibid. (quoting Restatement (Third) of the Foreign Relations Law of the United States § 907 cmt. a, at 395 (1987)). Petitioners have made no effort to overcome this presumption against judicial enforceability with respect to the treaties on which they rely. For this reason, those treaty claims should be rejected.

III. Hamdan forecloses petitioners' claims based on Army regulations.

Petitioners have claimed that Army Regulation 190-8 entitles them to be treated as prisoners of war. See Appellee Brief 75. As we have explained, even if their interpretation of the regulation were correct, the regulation could not override the President's contrary determination that al Qaeda and Taliban detainees are not entitled to prisoner-of war status. See Opening Brief 64. This Court accepted this

argument in Hamdan when it held that the regulation only "requires that prisoners receive the protections of the Convention `until some other legal status is determined by competent authority.' Slip op. 19. The Court went on to conclude that "[n]othing in the regulations, and nothing Hamdan argues, suggests that the President is not a `competent authority' for these purposes." Ibid.

Petitioners have not explained exactly what procedures they believe are guaranteed to them by Army Regulation 190-8. But even assuming that petitioners have a right to have their status determined by a "competent tribunal," the Hamdan Court held that a military commission was such a tribunal because, as specified by Army Regulation 190-8, it was "composed of three commissioned officers, one of whom must be field-grade." Ibid. The Combatant Status Review Tribunals (CSRTs) that have determined petitioners' status as enemy combatants also meet these requirements. See JA 1194 ("Each tribunal shall be composed of a panel of three neutral commissioned officers . . . . The senior member of each Tribunal shall be an officer serving in the grade of 0-6 and shall be its President. The other members of the Tribunal shall be officers in the grade of 0-4 and above."). Although the CSRTs did not specifically address petitioners' prisoner-of-war status, they did find petitioners to be enemy combatants by virtue of their association with Taliban or al Qaeda forces, see JA 1187, and this, combined with the President's determination concerning those groups, removes any doubt as to their prisoner-of-war status. Hamdan thus forecloses petitioners' claims under Army Regulation 190-8.

CONCLUSION

For the foregoing reasons, as well as for the reasons stated in our principal briefs, the district court's order should be reversed insofar as it denies the Government's motions to dismiss, and the cases should be remanded with instructions to dismiss.

Respectfully submitted,

PAUL D. CLEMENT *Solicitor General*

PETER D. KEISLER *Assistant Attorney General*

KENNETH L. WAINSTEIN *Acting United States Attorney*

GREGORY G. KATSAS
Deputy Assistant Attorney General

DOUGLAS N. LETTER
Terrorism Litigation Counsel

ROBERT M. LOEB
ERIC D. MILLER
Attorneys, Appellate Staff
Civil Division, Room 7256
Department of Justice
950 Pennsylvania Ave., N W.
Washington, D. C. 20530-0001

August 2, 2005

REPLY APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 05-5062, 05-5063

LAKHDAR BOUMEDIENE, et al., Petitioners-Appellants,

v.

GEORGE W. BUSH, et al., Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR THE FEDERAL APPELLEES

Appellees George W. Bush, et al., submit this supplemental brief in response to this Court's order of July 26, 2005, which directed the government to file a brief "addressing the effect of this court's opinion in Hamdan v. Rumsfeld, No. 04-5393 (D.C. Cir. July 15, 2005)." Hamdan significantly undercuts the claims advanced by petitioners in this case. Specifically, it bolsters our argument that the Due Process Clause of the Fifth Amendment is inapplicable to aliens captured abroad and held at Guantanamo Bay, Cuba. In addition, Hamdan forecloses petitioners' Geneva Convention claims altogether by nolding that the Geneva Convention does not create judicially enforceable rights, and its rationale is fully applicable to petitioners' other treaty-based claims. Finally, Hamdan undermines petitioners' argument that the President lacks the authority to detain petitioners as enemy combatants.

STATEMENT

In Hamdan v. Rumsfeld, ____ F.3d ____, 2005 WL 1653046, No. 04-5393 (D.C. Cir. July 15, 2005), this Court upheld the legality of the use of military commissions to try alien enemy combatants for violations of the laws of armed conflict. Hamdan himself, who served as the personal driver for Osama bin Laden and other high ranking al Qaeda members and associates, was captured during military operations in Afghanistan and was transferred to a detention facility at Guantanamo Bay, Cuba. In July 2003, the President issued a finding that "there is reason to believe that [Hamdan] was a member of al Qaeda or was otherwise involved in terrorism directed against the United States," and designated Hamdan for trial by military commission. Slip op. 4. In July 2004, Hamdan was charged with conspiracy to commit the offenses of attacking civilians, attacking civilian objects, murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent, and terrorism.

Hamdan filed a petition for a writ of habeas corpus in federal district court to challenge the commission proceedings. The district court granted the petition in part. Invoking various provisions of the Third Geneva Convention, that court enjoined the ongoing military commission proceedings against Hamdan and ordered him released to the general detention population at the Guantanamo Bay Naval Base.

This Court reversed. It held that the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), among other provisions, "authorized the military commission that will try Hamdan." Slip op. 9. It further held that the district court had erred in determining that the Third Geneva Convention creates judicially enforceable rights, see slip op. 10-13, and that members and affiliates of al Qaeda qualify for prisoner-of-war status under the Geneva Convention, see slip op. 13-14. Next, this Court stated that, contrary to Hamdan' s argument, the Supreme Court's decision in Rasul v. Bush, 124 S. Ct. 2686 (2004), considered only the "'narrow'

question" of the scope of statutory habeas jurisdiction, and the fact "[t]hat a court has jurisdiction over a claim does not mean the claim is valid." Slip op. 11, 13. And it held that military commissions need not follow the procedural rules laid out for courts-martial in the Uniform Code of Military Justice. See slip op. 17-18.

ARGUMENT

I. Hamdan undermines petitioners' claims based on the Due Process Clause of the Fifth Amendment.

As we explained in our principal brief, petitioners' constitutional claims lack merit because the Due Process Clause is inapplicable to aliens captured abroad and held at Guantanamo Bay, Cuba. See Brief for Appellees 13-27. Both the Supreme Court and this Court have been "emphatic" in rejecting "the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990); see also Johnson v. Eisentrager, 339 U.S. 763, 781-85 (1950). Under Eisentrager, the applicability of the Fifth Amendment turns on whether the United States is sovereign over a territory, not whether it merely exercises control there. See id. at 778; see also Verdugo, 494 U.S. at 269.

Petitioners do not contend that the United States is sovereign at Guantanamo Bay, but instead rely on an expansive reading of the Supreme Court's decision in Rasul v. Bush, 124 S. Ct. 2686 (2004). In Rasul, the Court held that jurisdiction under the habeas statute extends to claims brought by detainees at Guantanamo Bay. Petitioners attach dispositive significance to a footnote in Rasul stating that their allegations "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. § 2241(c)(3)." 124 S. Ct. at 2698 n.15. In their view, this footnote implicitly overruled the Fifth Amendment holdings of Eisentrager and its progeny.

Hamdan undermines petitioners' implausible

reading of Rasul. In Hamdan, this Court explained that Rasul addressed only the scope of statutory habeas jurisdiction, leaving Eisentrager's substantive holdings intact. As the Court stated, Rasul decided a "'narrow' question: whether federal courts had jurisdiction under 28 U. S.C. § 2241 `to consider challenges to the legality of the detention of foreign nationals' at Guantanamo Bay." Slip op. 11 (quoting Rasul, 124 S. Ct. at 2690). The Court further stressed: "That a court has jurisdiction over a claim does not mean that the claim is valid. See Bell v. Hood, 327 U.S. 678, 682-83 (1946)." Slip op. 13; compare Brief for Appellees 23 (citing Bell for the proposition that "[no say that these allegations are sufficient for jurisdictional purposes, a reading of footnote 15 strongly suggested by context, establishes only that they are not `wholly insubstantial' or `frivolous' on the merits"). Thus, Hamdan supports our argument that Rasul did not alter the established principle that the Fifth Amendment is inapplicable to aliens who are outside the sovereign territory of the United States.

II. Hamdan forecloses petitioners' treaty-based claims.

In Hamdan, this Court held that the Third Geneva Convention does not create judicially enforceable rights. See slip op. 13 ("We therefore hold that the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court."). It also rejected the argument, advanced by petitioners here, see Appellants' Brief 30-33, that the habeas statute permits courts to enforce treaty rights that otherwise would not be judicially enforceable. See slip op. 13 ("The availability of habeas may obviate a petitioner's need to rely on a private right of action . . . but it does not render a treaty judicially enforceable.").

Petitioners in this case have asserted claims under the Fourth Geneva Convention rather than the Third Geneva Convention. But the two conventions are indistinguishable in all material respects, and petitioners have identified no reason

why one would be judicially enforceable while the other is not. More generally, Hamdan' s reasoning undermines whatever claims petitioners might have under the Fourth Geneva Convention. Hamdan explained that "this country has traditionally negotiated treaties with the understanding that they do not create judicially enforceable individual rights." Slip op. 10. That is because, "[a]s a general matter, a treaty is primarily a compact between independent nations,' so "[I]f a treaty is violated, this `becomes the subject of international negotiations and reclamation,' not the subject of a lawsuit." Ibid. (quoting Head Money Cases, 112 U.S. 580, 598 (1884)). Therefore, "' [i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.'" Ibid. (quoting Restatement (Third) of the Foreign Relations Law of the United States § 907 cmt. a, at 395 (1987)). Petitioners have made no effort to overcome this presumption against judicial enforceability with respect to the Fourth Geneva Convention--or with respect to the International Covenant on Civil and Political Rights, on which they also rely, see Appellants' Brief 33-34. For this reason, petitioners' treaty claims should be rejected.

III. Hamdan supports the President's authority to detain enemy combatants.

Petitioners contend that the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), does not authorize their detention. See Appellants' Brief 20-27. As we have explained, the detention of enemy combatants is independently justified by the President's inherent constitutional authority, even apart from the AUMF. See Brief for Appellees 55-56. But in any event, Hamdan confirms that petitioners' reading of the AUMF is unduly narrow. As Hamdan explains, the AUMF gives the President authority "'to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided' the [September 11] attacks and recognized the President's `authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.' Slip op. 8 (quoting AUMF). Hamdan held

that this authority includes, as "an `important incident to the conduct of war,' the power to seize and detain enemy combatants, and to try and punish them for violations of the laws of war. Ibid (quoting In re Yamashita, 327 U.S. 1 (1946)). This power necessarily includes the presidential authority at issue in this case.

Petitioners suggest that the AUMF is limited to those individuals who were personally involved in the September 11 attacks, see Appellants' Brief 20, or that it applies only in certain geographical areas, see id. 23. But see Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2048, 2109, 2118 (2005) (arguing that "Congress has authorized the President to use force against all members of al Qaeda, including members who had nothing to do with the September 11 attacks and even new members who joined al Qaeda after September 11" and that "the AUMF authorizes the President to use force anywhere he encounters the enemy"). While Hamdan had no occasion to address the precise arguments advanced by petitioners here, its broad reading of the AUMF contains no suggestion of the limitations that petitioners advocate.

CONCLUSION

For the foregoing reasons, as well as for the reasons stated in our principal brief, the judgment of the district court should be affirmed.

Respectfully submitted,

PAUL D. CLEMENT *Solicitor General*

PETER D. KEISLER *Assistant Attorney General*

KENNETH L. WAINSTEIN *Acting United States Attorney*

GREGORY G. KATSAS
Deputy Assistant Attorney General

DOUGLAS N. LETTER
Terrorism Litigation Counsel

ROBERT M. LOEB
ERIC D. MILLER
Attorneys, Appellate Staff
Civil Division, Room 7256
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D. C. 20530-0001

August 2, 2005

REPLY APPENDIX E

No. 02-CV-00299

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID M. HICKS, Petitioner

v.

GEORGE WALKER BUSH, President of the United States, et al., Respondents,

RESPONDENTS RENEWED RESPONSE AND MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW WITH RESPECT TO PETITIONER'S CHALLENGES TO THE MILITARY COMMISSION PROCESS

....

Hamdan v. Rumsfeld

The D.C. Circuit's decision in Hamdan resolved a number of core issues concerning the military commissions. As explained below, it resolved challenges to the lawfulness of the military commissions and determined, inter alia, that abstention is appropriate with respect to issues concerning how those commissions carry out their responsibilities.

a. In Hamdan, the Court of Appeals first rejected

the argument that the President lacked authority[1] to establish the military commissions.[2] The Court of Appeals first concluded that Congress had authorized military commissions through the authorization for the use of force contained in the AUMF, because an "'important incident to the conduct of war is the adoption of measures by the military commander . . . to seize and subject to disciplinary measures those enemies who . . . have violated the law of war' [and that] '[the trial and punishment of enemy combatants' . . . is thus part of the 'conduct of war.'" 2005 WL 1653046 at *3 (quoting In re Yamashita, 327 U.S. 1, 11 (1946)). The Court of Appeals further held that two statutes reflected the President's authority to establish military commissions. First, it noted that the Supreme Court in Ex parte Quirin, 317 U.S. 1, 28-29 (1942), had held that Congress authorized military commissions through the predecessor to 10 U.S.C. § 821.[3] See 2005 WL 1653046 at *3.

---

[1] Hamdan had raised the argument that Article I, § 8, of the Constitution gives Congress the power "to constitute Tribunals inferior to the supreme Court," that "Congress has not established military commissions, and that the President has no inherent authority to do so under Article II." 2005 WL 1653045 at *2.

[2] In addressing the President's authority to establish the military commissions, the Hamdan Court rejected the government's argument that the court should abstain with respect to such jurisdictional issues under the doctrine of abstention reflected in Schlesinger v. Councilman, 420 U.S. 738 (1975), applied in this Circuit in New v. Cohen, 129 F.3d 639 (D.C. Cir. 1997), which generally eschews federal court intervention in ongoing military tribunals. See 2005 WL 1653046 at *1-*2.

[3] Section 821 provides that the provision of courts-martial jurisdiction in the UCMJ does not "deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commission." Quirin addressed Article 15 of the Articles of War, enacted in 1916. See 317 U.S. at 28-29. As noted in Hamdan, since the "modern version of Article 15 is 10 U.S.C. § 821," Congress authorized the President to establish

Second, the Court of Appeals noted that Congress had also authorized the President to establish procedures for military commissions in 10 U.S.C. § 836(a). See id. The D.C. Circuit held that in light of these enactments, Quirin, and Yamashita, "it is impossible to see any basis for Hamdan's claim that Congress has not authorized military commissions."[4] Id. (citation omitted).

b. The D.C. Circuit also rejected Hamdan's challenges to the military commissions based on the GPW. The Court first held that the GPW did not confer rights enforceable in federal court. 2005 WL 1653046 at *4. The Court relied on the holding of Johnson v. Eisentrager, 339 U.S. 763 (1950), that the 1929 Geneva Convention was not judicially enforceable, concluding that this aspect of Eisentrager is "still good law and demands . . . adherence."[5] 2005 WL 1653046 at *4.[6]

The Court of Appeals further held that even if the

---

military commissions through this statute. 2005 WL 1653046 at *3.

[4] The Hamdan court dismissed an argument attempting to distinguish Quirin and Yamashita on the ground that the military commissions in those cases were in "war zones" while Guantanamo Bay is far removed from the battlefield. The Hamdan Court questioned "why this should matter." 2005 WL 1653046 at *3. Further, the Court found that the distinction did not hold because the military commission in Quirin sat in the Department of Justice building in Washington, D.C., and the military commission in Yamashita sat in the Philipines after the Japanese surrender. Id.

[5] The D.C. Circuit compared the 1949 GPW to the 1929 Convention and found that although there are differences, "none of them renders Eisentrager's conclusion about the 1929 Convention inapplicable to the 1949 Convention." 2005 WL 1653046 at *5.

[6] The D.C. Circuit also found that Eisentrager required rejection of any argument that the habeas statute, 28 U.S.C. § 2241, somehow permits courts to enforce the GPW. 2005 WL

GPW could be judicially enforced, Hamdan's challenge to the commission would fail. The Court rejected Hamdan's argument that the military commission ran afoul of GPW art. 102, which provides that a "prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power."[7] 2005 WL 165304 at *6. The Hamdan Court noted that the petitioner in the case did not satisfy the requirements for treatment as a prisoner-of war ("POW")[8] and that any claimed assertion of such status requiring resolution could be decided by the military commission. Id.

The Court also concluded that the GPW would not apply to al Qaeda, of which petitioner in the case was alleged to be a part. The Court noted that the so-called Common Articles[9] in the GPW contemplate application in two types of conflicts: GPW art. 2 (Common Article 2)

1653046 at *6. Hamdan noted that Eisentrager determined that any individual rights specified in the 1929 Geneva Convention "were to be enforced by means other than the writ of habeas corpus." Id. Moreover, while the Supreme Court's decision in Rasul v. Bush, 542 U.S. 466, 124 S. Ct. 2686 (2004), gave district courts jurisdiction over Guantanamo Bay detainee habeas corpus petitions, "Rasul did not render the Geneva Convention judicially enforceable." 2005 WL 1653046 at *6. Hamdan noted that while the availability of habeas may relieve a petitioner of the need for a private right of action, it does not render a treaty judicially enforceable. Id. The Court of Appeals further noted that merely providing a court jurisdiction over a claim does not make the claim valid. Id. (citing Bell v. Hood, 327 U.S. 678, 682-83 (1946)).

[7] If Article 102 was applicable, the relevant court would be a court-martial.

[8] See GPW art. 4.

[9] The Common Articles are contained in all the Geneva Conventions, including the GPW.

provides for application of the Conventions in international conflicts, namely, (a) in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties;" (b) in "all cases of partial or total occupation of the territory of a High Contracting Party;" or (c) when a non-signatory "Power[] in conflict" "accepts and applies the provisions [of the Conventions]." The Court concluded, however, that al Qaeda is neither a "High Contracting Party" nor a "Power" that "accepts and applies" the Conventions, within the meaning of Common Article 2. 2005 WL 1653046 at *6.

The second type of conflict is contemplated in GPW art. 3 (Common Article 3) and involves "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties," which the Hamdan Court described as "a civil war." 2005 WL 1653046 at *7. In such cases, Common Article 3 prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by a civilized people." Although Afghanistan is a "High Contracting Party" and Hamdan was captured there, the Hamdan Court deferred to President Bush's determination that the conflict against al Qaeda is international in scope, and thus, not covered by Common Article 3.[10] Id. The Court noted that such a determination "is the sort of political-military decision constitutionally committed to" the President, id. (citing Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986)), and that the President's "construction and application of treaty provisions is entitled to 'great weight,'" id. (citing United

---

[10] See Memorandum for the Vice President, the Secretary of State, the Secretary of Defense, et al., from President George W. Bush Re: Humane Treatment of al Qaeda and Taliban Detainees ¶ 2 (Feb. 8, 2002) (available at http://www.library.law.pace.edu/research/020207_bushmemo.pdf) (finding "relevant conflicts are international in scope").

States v. Stuart, 489 U.S. 353, 369 (1989); Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 186 (1982); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961)).

In a key aspect of its opinion, however, the Hamdan Court held that regardless of its conclusion regarding application of Common Article 3 to al Qaeda, the Court would in any event "abstain from testing the military commission against the requirement in Common Article 3(1)(d) that sentences must be pronounced 'by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'" See 2005 WL 1653046 at *7. The Court referenced the doctrine of abstention reflected in Schlesinger v. Councilman, 420 U.S. 738 (1975), applied in this Circuit in New v. Cohen, 129 F.3d 639 (D.C. Cir. 1997), which eschews federal court intervention in ongoing military tribunals where the federal court challenge does not raise substantial arguments regarding the military tribunal's jurisdiction over the accused, i.e., regarding the right of the military to try the accused at all. See New, 129 F.3d at 644 (citing Councilman, 420 U.S. at 759). The Court stated:

> Unlike [petitioner's] arguments that the military commission lacked jurisdiction, his argument here is that the commission's procedures - particularly its alleged failure to require his presence at all stages of the proceedings - fall short of what Common Article 3 requires. The issue thus raised is not whether the commission may try him, but rather how the commission may try him. That is by no stretch a jurisdictional argument. No one would say that a criminal defendant's contention that a district court will not allow him to confront witnesses against him raises a jurisdictional argument. Hamdan's claim therefore falls outside the recognized exception to the Councilman doctrine. Accordingly, comity would dictate that we defer to the ongoing military

> proceedings. If [petitioner] were convicted, he could contest his conviction in federal court after he exhausted his military remedies.

2005 WL 1653046 at *7 (emphasis in original).[11]

c. The D.C. Circuit in Hamdan also rejected arguments that the military commissions established by the Military Order were contrary to the Uniform Code of Military Justice. Petitioner in the case, and the district court, had interpreted UCMJ art. 36 (10 U.S.C. § 836)[12] as requiring "that military commissions must comply in all respects with the requirements of" the UCMJ, including those provisions that were specifically addressed to the conduct of courts-martial. 2005 WL 1653046 at *8. The D.C. Circuit, however, concluded that given the careful distinctions made in the UCMJ between courts-martial and military commissions, the "far more sensible reading" of § 836 was that "the President may not adopt procedures for military commissions that are 'contrary or inconsistent with' the UCMJ's provisions

---

[11] Senior Circuit Judge Williams, in a concurrence, fully agreed with the panel's conclusions that the GPW is not judicially enforceable, but opined that Common Article 3 in fact does apply to the conflict with al Qaeda. He further agreed with the panel, however, that abstention on issues of application of the GPW was appropriate. 2005 WL 1653046 at *9.

[12] 10 U.S.C. § 836 provides:

> Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

governing military commissions."[13] Id. Thus, only UCMJ provisions that specifically address themselves to military commissions would impose constraints on the commission, see id., and, as noted in Hamdan, such provisions "impose[] only minimal restrictions upon the form and function of military commissions," id. (citing 10 U.S.C. §§ 828 (court reporters and

interpreters), 847(a)(1) (refusal to comply with subpoena), 849(d) (use of depositions)).

d. The final issue discussed in the Hamdan opinion was whether Army Regulation 190-8, which provides "policy, procedures, and responsibilities" for the Military with respect to "the administration, treatment, employment, and compensation" of military detainees, see AR 190-8 § 1-1.a (copy attached as Exhibit A), provided petitioner any claim.[14] The Court concluded it did not. The Court first noted AR 190-8 § 1-5.a(2) and its requirement that detainees be provided GPW protections "until some other legal status is determined by competent authority." The Court concluded that the President, in making his decisions regarding (non)application of the GPW to al Qaeda, was

---

[13] The Hamdan Court found that its reading of the UCMJ was supported, and the district court's interpretation was undermined, by the Supreme Court's opinion in Madsen v. Kinsella, 343 U.S. 341 (1952). The Supreme Court, writing two years after the enactment of the UCMJ, referred to military commissions as "our commonlaw war courts. . . . Neither their procedure nor their jurisdiction has been prescribed by statute." 2005 WL 1653046 at *8 (quoting Madsen, 343 U.S. at 346-48). As the Hamdan Court noted, it is "difficult, if not impossible, to square the Court's language in Madsen with the sweeping effect with which the district court would invest Article 36." 2005 WL 1653046 at *8.

[14] The Court stated that it had considered all of the petitioner's remaining claims, but that "the only one requiring further discussion" was the AR 190-8 argument. 2005 WL 1653046 at *9. Issues that the Court considered but did not consider worthy of discussion included petitioner's argument that the non-statutory based charge of conspiracy brought against petitioner was not triable by military commission. See Hamdan Brief of Appellee at 70-71 (available at 2004 WL 3080434 at *70).

such an authority. 2005 WL 1653046 at *9. The Hamdan Court further noted that to the extent the petitioner raised a claim to entitlement to a further determination of status by a "competent tribunal" under AR 190-8 § 1-6, then the military commission in the case, being composed of at least one field-grade officer, id. § 1-6.c, could decide the issue. 2005 WL 1653046 at *9.

In light of its holdings, the D.C. Circuit reversed the decision of the district court granting in part Hamdan's writ of habeas corpus and denying the government's motion to dismiss. 2005 WL 1653046 at *9.

ARGUMENT

Since the founding of this nation, the military has used military commissions during wartime to try violations against the law of war. Nearly ninety years ago, Congress recognized this historic practice and approved its continuing use in the Articles of War. And nearly sixty years ago, the Supreme Court upheld the use of military commissions during World War II against a series of challenges, including cases involving a presumed American citizen, captured in the United States, Ex parte Quirin, 317 U.S. 1 (1942); the Japanese military governor of the Phillippines, Yamashita v. Styer, 327 U.S. 1 (1946); German nationals who alleged that they worked for civilian agencies of the German government in China, Johnson v. Eisentrager, 339 U.S. 763 (1950); and the spouse of a serviceman posted in occupied Germany, Madsen v. Kinsella, 343 U.S. 341 (1952). Thus, both Congress and the Judiciary historically have approved the Executive's use of military commissions during wartime. And just over one month ago, in Hamdan, the D.C. Circuit confirmed the President's power to establish and utilize military commissions in the ongoing war against al Qaeda and the Taliban. The Hamdan decision effectively resolves the claims raised by petitioner with respect to his impending trial by military commission; those claims are properly the subject of abstention and/or lack merit. Petitioner's military commission claims, therefore, should be dismissed.

I. *HAMDAN* REQUIRES REJECTION OF PETITIONER'S CLAIM THAT THE MILITARY COMMISSIONS ARE NOT LAWFULLY ESTABLISHED.

The D.C. Circuit's decision in Hamdan resolves petitioner's challenge in Count 1 of the petition, Petition ¶¶ 41-49, that the military commission that will try petitioner lacks jurisdiction because Congress did not authorize the President to establish such commissions. As explained previously, the D.C. Circuit held that "Congress authorized" the President to establish military commissions,[15] such as the one that will try petitioner Hicks, through the AUMF, 10 U.S.C.30 § 821, and 10 U.S.C. § 836(a).[16] See 2005 WL

---

[15] Respondents note that they have argued in this case that abstention is appropriate with respect to all aspects of the instant case, including the claims in Count 1. The D.C. Circuit in Hamdan chose to explore the issue of the lawfulness of military commissions. See supra note 16 (where we note the D.C. Circuit did not abstain). Respondents, however, expressly reserve their argument that abstention is appropriate with respect to all claims related to military commission issues in this case, as more fully argued in respondents' original briefs on military commission issues in this case. See Respondents' Response and Motion to Dismiss or for Judgment as a Matter of Law with Respect to Challenges to the Military Commission Process Contained in Petitioner's Second Amended Petition for Writ of Habeas Corpus Complaint for Injunctive, Declaratory, and Other Relief (dkt. no. 88); Response to Petitioner's Brief in Opposition to Respondents' Motion to Dismiss and in Support of Petitioner David M. Hicks' Cross-Motion for Partial Summary Judgment (dkt. no. 120).

[16] Petitioner is also wrong that the "Constitution expressly grants Congress the sole powerto create military commissions and the offenses to be tried by them," Petition at ¶ 43. The President has inherent authority to create military commissions pursuant to the powers granted him by the Constitution as Commander in Chief, see U.S. CONST. art. III, § 2, and that authority is confirmed by historical practice. This issue is more fully articulated in Respondents' Response and Motion to Dismiss or for Judgment as a Matter of Law with Respect to Challenges

1653046 at *4. Petitioners' challenge to the lawfulness of the military commission in this case, therefore, must be rejected.

In addition, petitioner's claim that military commissions lack authority to try anyone "far from the locality of actual war," see Petition ¶ 50, such that the military commission that will try him may not lawfully sit at Guantanamo Bay, see id. ¶ 51, likewise must be rejected. As a matter of common sense, it is wrong to argue either that any location in the globe is "far from the locality of actual war" when petitioner was captured in the context of a global war where the enemy has hatched its plans to attack and/or conducted attacks and military operations against the United States and its allies in Europe, Africa, Asia, the Middle East, and in the United States itself - planning and attacks that continue to this day[17] - or that the Military cannot conduct a commission trial in a setting that is less likely to be subject to enemy attack. In any event, the petitioner in Hamdan raised a similar assertion in the context of attempting to distinguish his case from cases in which the Supreme Court approved military commissions (Quirin and Yamashita), and in response, the D.C. Circuit questioned "why this should matter." 2005 WL 1653046 at *3. Further, the Court found that the attempted distinction was baseless because the military commission in Quirin sat

---

to the Military Commission Process Contained in Petitioner's Second Amended Petition for Writ of Habeas Corpus Complaint for Injunctive, Declaratory, and Other Relief at 20-22 (dkt. no. 88), and respondents' Response to Petitioner's Brief in Opposition to Respondents' Motion to Dismiss and in Support of Petitioner David M. Hicks' Cross-Motion for Partial Summary Judgment at 16-17 (dkt. no. 120). Hamdan's confirmation that Congress has authorized the President to establish military commissions made it unnecessary to reach this issue; nevertheless, the President's inherent authority supplies an independent basis upon which to conclude that the military commission in this case has been lawfully established. See also Hamdan, 2005 WL 1653046 at *2 (noting President's reliance on his constitutional authority in establishing military commissions).

[17] See supra note 1.

in the Department of Justice building in Washington, D.C., and the military commission in Yamashita sat in the Philipines after the Japanese surrender. Id. Petitioner's claim that the military commission that will try him may not lawfully sit at Guantanamo Bay, accordingly, is meritless and must be rejected.

For these reasons, Count 1 of the Petition in this case, challenging the establishment and situs of the military commission, must be dismissed.

II. PETITIONER'S CLAIMS UNDER THE GPW, THE UCMJ, AND THE DUE PROCESS CLAUSE WITH RESPECT TO THE MILITARY COMMISSION'S PROCEDURES MUST BE REJECTED.

Petitioner also asserts that various aspects of the military commission's procedures violate the GPW, the UCMJ, and the Constitution's Due Process Clause. Petition ¶¶ 66-74. Included with this claim is a complaint regarding the possibility that the military commission may ultimately rely on evidence from interrogations that petitioner alleges were conducted in a way that violated due process. Id. ¶¶ 68, 110-12. Petitioner's challenge thus amounts to a complaint about commission procedural rules, including about potentiai evidence Hicks believes the commission would be free to consider. As explained below, these claims must be rejected because they are subject to abstention or otherwise have no validity.

A. Petitioner's Claims under the GPW, the UCMJ, and the Due Process Clause are Subject to Abstention.

The Hamdan Court disposed of the types of procedurally related claims raised by petitioner here by finding that questions of how, as opposed to whether, a detainee should be tried by military commission are appropriate for abstention. See 2005 WL 1653046 at *7. Specifically, the Court, relying on the Councilman abstention

doctrine, declined to "test[]" the military commission at issue against the requirement of Common Article 3 that sentences be handed down by "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Id. It did so in the context of Hamdan's assertion that the military commission could exclude (and already had excluded) him from stages of the proceeding, potentially denying him the ability to confront witnesses. Id. ("That is by no stretch a jurisdictional argument."). Comity, according to the Court, dictated deference to the military proceedings on such matters of how the commission carried out its responsibilities. See id. In the Court's view, there was no reason that, if convicted, a military commission defendant could not contest the conviction, i.e., the manner in which it came about, if appropriate, in post-trial (presumably habeas) proceedings in federal court. See id.

This abstention principle would be applicable not only to petitioner Hicks's challenges under the GPW to procedural aspects of the military commission that will try him, but to his challenges under the UCMJ and the Due Process Clause as well. As Hamdan recognized, the jurisdictional exception to the Councilman doctrine is based primarily on the theory that "setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction." 2005 WL 1653046 at *2. Thus, a primary consideration is whether the right at stake is the "right not to be tried" as opposed to "a right whose remedy requires dismissal of the charges." Cf. United States v. Hollywood Motor Car. Co., Inc., 458 U.S. 263, 271 (1982) (per curiam). "The former necessarily falls into the category of rights that can be enjoyed only if vindicated prior to trial. The latter does not." Id. Petitioner's challenges to the procedural

aspects of the military commission under the UCMJ and the Due Process Clause, thus, would be subject to abstention.[18]

B. Petitioner's Claims Should be Rejected on the Merits.

Aside from the issue of abstention, petitioner's claims under the GPW and the UCMJ must be rejected on the merits under Hamdan. As discussed supra, Hamdan determined that the GPW is not judicially enforceable, and, in any event, does not apply to those who are part of al Qaeda. See 2005 WL 1653046 at *6-*7. Hamdan also rejected the argument, made by petitioner, Petition ¶ 70, that military commissions must comply with all the requirements of the UCMJ. 2005 WL 1653046 at *8.

As to petitioner's due process challenge to the military commission, respondents have previously pointed out, and another Judge of this Court has determined, that aliens, such as petitioner, outside of the United States and with no voluntary connections thereto, cannot invoke the Constitution of the United States. See Khalid v. Bush, 355 F.

---

[18] Though petitioner's due process argument may raise constitutional questions, this does not support an argument for premature habeas review. "'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'" Department of Commerce v. United States House of Representatives, 525 U.S. 316, 343 (1999) (quoting Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 105 (1944)). Here, there would be no need for the adjudication of petitioner's constitutional claim depending on the actions taken during the commission, including possible acquittal. Due process claims are routinely considered in post-conviction proceedings. Cf. Gray v. Netherland, 518 U.S. 152 (1996) (post-conviction habeas petition raising due process challenge to the manner in which the prosecution introduced evidence of petitioner's criminal conduct); Jamerson v. Secretary for Dep't. of Corrections, 410 F.3d 682 (11th Cir. 2005) (post-conviction habeas petition raising due process challenge to jury instructions); Howard v. Bouchard, 405 F.3d 459 (6th Cir. 2005) (post-conviction habeas petition raising due process challenge to eyewitness identification procedure).

Supp. 2d 311, 320 (D.D.C. 2005) ("Non-resident aliens captured and detained outside the United States have no cognizable constitutional rights."); see also Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law § II.A. (dkt. no. 82) ("EC Response") (citing, inter alia, United States v. Verdugo Urquidez, 494 U.S. 259 (1990), and Johnson v. Eisentrager, 339 U.S. 763 (1950)). Indeed, even the Hamdan Court questioned whether the petitioner in that case could assert a constitutional claim against trial by military commission, noting prior law that aliens outside the sovereign territory of the United States and lacking a substantial voluntary connection to this country lack constitutional rights. See 2005 WL 1653046 at *2 (expressing "doubt" whether a constitutional claim can be asserted by such a person, citing People's Mojahedin Org. v. Dep't of State, 182 F.3d 17, 22 (D.C. Cir. 1999); and 32 County Sovereignty Comm. v. Dep't State, 292 F.3d 797, 799 (D.C. Cir. 2002))[19]; see also 2005 WL 1653046 at *5 (characterizing Rasul v. Bush, 542 U.S. 466, 124 S. Ct. 2686 (2004), as deciding only the "narrow" question of whether federal courts have jurisdiction under the habeas statute).

---

[19] In People's Mojahedin, the D.C. Circuit, in considering a petition for judicial review bytwo groups designated as "foreign terrorist organizations" by the United States Secretary of State, found that a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." 182 F.3d at 22. The Court based this finding on the Supreme Court's holding in United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990), that aliens "receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." Similarly, in 34 County Sovereignty Comm., involving Irish political organizations, the D.C. Circuit found that because the organizations could not "rightly lay claim to having come within the United States and developed substantial connections with this country" the Secretary of State did not have to provide them "with any particular process before designating them as foreign terrorist organizations." 292 F.3d at 799 (citations and quotation marks omitted).

Of course, Judge Green determined in her decision on respondents' motion to dismiss the enemy combatant claims in this case that the petitioners in the case, including Hicks, stated valid procedural due process claims under the Fifth Amendment and that the Combatant Status Review Tribunal procedures used by the government to confirm the petitioners' "enemy combatant" status "violate[d] the petitioners' rights to due process of law." See In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 445 (D.D.C. 2005). The issue, however, of whether non-resident alien detainees at Guantanamo Bay, such as petitioner, can avail themselves of constitutional rights is the subject of the pending appeals in Khalid and In re Guantanamo, which are scheduled for oral argument on September 8, 2005. Even assuming it is ultimately determined that petitioners such as Mr. Hicks could avail themselves of the Constitution, such rights vis-á-vis military commission procedures can be fully vindicated in post-commission review proceedings in federal court as appropriate, consistent with Hamdan's teaching, making abstention with respect to such claims appropriate. See 2005 WL 1653046 at *7.

III. PETITIONER'S EQUAL PROTECTION CLAIMS SHOULD BE DISMISSED.

Petitioner claims that, because they apply to non-citizens only, the President's Military Order and MCO No. 1 violate the equal protection component of the Fifth Amendment and 42 U.S.C. § 1981. See Petition ¶¶ 75-81. Like the other claims the petition raises, there are numerous reasons why this claim lacks merit or should otherwise be dismissed. The equal protection claim raised by petitioner is a procedural rather than jurisdictional challenge, and the D.C. Circuit taught in Hamdan that federal courts should abstain under Councilman from entertaining pre-military commission trial procedural challenges. Further, even if petitioner could avail himself of the equal protection component of the Fifth Amendment, his equal protection

claim fails because (1) Hicks is not a member of a suspect class and, (2) even if he were, courts have historically shown extraordinary deference to the federal government regarding its policies toward aliens - deference that reaches its apex when applied to decisions of the President during wartime that implicate national security and sensitive foreign policy matters. In addition, Hicks's statutory claim under 42 U.S.C. § 1981 fails because the statute is facially inapplicable to federal action, and, in any event offers no greater protection than the Constitution.

For these reasons, petitioner's equal protection claims with respect to the military commission must be rejected.

A. Petitioner's Equal Protection Claim is Subject to *Councilman* Abstention Because it is a Procedural, Rather than Jurisdictional, Challenge.

As a threshold matter, Hamdan prevents consideration of petitioner's equal protection claims at this stage of proceedings because the claims fall outside the recognized jurisdictional exception to the Councilman doctrine. 2005 WL 1653046 at *2. Petitioner's equal protection claims are not jurisdictional in nature, but rather challenge the application to the non-citizen petitioner of the military commission's procedures, which according to petitioner are "less protective" than those available to citizens through "civilian justice." See Petition ¶ 77. Even in the criminal justice context, courts do not treat equal protection claims as jurisdictional challenges to the underlying criminal proceedings. Indeed, courts do not enjoin ongoing trial proceedings to permit defendants to proceed with an interlocutory appeal or habeas petition challenging the denial of an equal protection claim. Instead, courts regularly proceed with adjudication of the indictment and then permit the defendant as appropriate to assert any equal protection claim in a post-conviction habeas petition. See, e.g., Miller-El v. Dretke, 125 S. Ct. 2317, 2222-23 (2005) (post-

conviction habeas petition raising equal protection challenge to discriminatory jury selection); Ragland v. Hundley, 79 F.3d 702, 706 (8th Cir. 1996) (post- conviction habeas petition raising equal protection challenge to felony-murder doctrine); United States v. Jennings, 991 F.2d 725, 726-31 (11th Cir. 1993) (post-conviction habeas petition raising selective prosecution equal protection claim). That approach should be followed in this case. Petitioner should not be permitted to assert his constitutional defense to commission proceedings by way of a preemptive equal protection challenge, especially when petitioner has the opportunity to raise the same argument in post-conviction habeas review, if necessary.[20]

As Hamdan recognized, the jurisdictional exception to the Councilman doctrine is based primarily on the theory that "setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction." 2005 WL 1653046 at *2. This doctrine originated in the context of challenges to trial court jurisdiction in interlocutory appeals of decisions denying motions to dismiss indictments. See, e.g., Abney v. United States, 431 U.S. 651, 662 (1977) (cited in Hamdan, 2005 WL 1653046 at *2); United States v. Cisneros, 169 F.3d 763 (D.C. Cir. 1999) (cited in Hamdan, 2005 WL 1653046 at *2). In that context, one of the primary considerations is whether the right at stake is the "right not to be tried" as opposed to "a right whose remedy requires dismissal of the charges." United States v. Hollywood Motor Car. Co., Inc., 458 U.S. 263, 271 (1982) (per curiam). "The former necessarily falls into the category of rights that can be enjoyed only if vindicated prior to trial. The latter does not." Id. Applying this analogous framework to the present case,

---

[20] Although petitioner's equal protection argument may raise constitutional questions, this does not support his argument for premature habeas review. See supra note 33. Here, there would be no need for the Court to adjudicate petitioner's constitutional claims if the military commission acquits him of the charges brought against him.

petitioner's equal protection challenge does not fall within the category of rights that must be vindicated prior to trial. Unlike a Double Jeopardy argument, for instance, petitioner's equal protection challenge does not encompass the "right not to be haled into court at all." See Blackledge v. Perry, 417 U.S. 21, 30 (1974). Rather, petitioner stands in the same position as a criminal defendant who asserts a pretrial motion attacking an indictment on the ground that the underlying criminal statute authorizing the prosecution is unconstitutional. See Cisneros, 169 F.3d at 769-70. Such claims are not jurisdictional and, as explained above, any decision by the trial court - in this case the military commission - could be reviewed, if appropriate, through a subsequent habeas petition in the event petitioner is convicted.

Petitioner also cannot evade Hamdan by couching his equal protection claim as jurisdictional. Petitioner's equal protection challenge appears premised on the theory that if the President's Military Order is unconstitutional, it is void ab initio, and the military commission has no jurisdiction to try him for any offense. The D.C. Circuit, however, rejected a similar theory in United States v. Baucum, 80 F.3d 539, 540 (D.C. Cir. 1996) (holding that constitutional challenges to criminal statutes are "nonjurisdictional"). In Baucum, the defendant argued that a commerce clause challenge to a criminal drug statute, 21 U.S.C. § 860(a), should be considered a jurisdictional challenge, based on the theory that if the statute is unconstitutional, the court has no jurisdiction to convict the defendant for that offense. 80 F.3d at 540. The D.C. Circuit emphatically rejected this position, noting the Supreme Court's refusal to adopt "such a broad-sweeping proposition." Id. at 541.

The logic of Baucum applies equally to this case. Petitioner's equal protection challenge to the President's Military Order cannot be construed as a jurisdictional objection to the military commission, instead it is a challenge to the military commission's procedures. Accordingly,

Hamdan controls, 2005 WL 1653046 at *7 ("The issue thus raised is not whether the commission may try him, but rather how the commission may try him. That is by no stretch a jurisdictional argument."), and the Court, in the interest of comity, should defer to the military commission and abstain from considering petitioner's equal protection claims in the first instance.

B. Even If Petitioner Could Invoke the Fifth Amendment, His Claim Lacks Merit.

Even assuming contrary to Verdugo-Urquidez and Eisentrager that Hicks could raise a claim under the Fifth Amendment's equal protection component,[21] that claim lacks merit. The President found that in order "[t]o protect the United States and its citizens," it was "necessary" to establish military commissions to try non-citizens captured during the ongoing conflict for violations of the law of war. See Military Order § 1(e). This politically sensitive determination would be subject to the utmost deference, because it constitutes an exercise of the President's war powers vis-á-vis alien enemy combatants and implicates

---

21 As respondents explained regarding petitioner's Fifth Amendment's due process claim, respondents have previously pointed out, and another Judge of this Court has determined, that aliens, such as petitioner, outside of the United States and with no voluntary connections thereto, cannot invoke the U.S. Constitution and Hamdan signaled the legitimacy of this result. See supra § II.B. And while Judge Green determined in her decision concerning the enemy combatant claims in this case that petitioner stated valid claims under the Fifth Amendment's due process clause, she did not make a finding relating to the Fifth Amendment's equal protection component. See In re Guantanamo, 355 F. Supp. 2d at 445. The issue, however, of whether non- resident alien detainees, such as petitioner, can avail themselves of constitutional rights is the subject of the pending appeals. Even assuming it is ultimately determined that petitioner can avail himself of the Constitution, such rights vis-á-vis military commission procedures can be fully vindicated in post-commission federal court proceedings consistent with Hamdan's teaching, making abstention appropriate. See 2005 WL 1653046 at *7.

pressing national security and foreign policy concerns. As the Supreme Court has repeatedly observed:

> [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Matthews v. Diaz, 426 U.S. 67, 81 n.17 (1976) (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952)). There is no basis for disturbing the President's judgment here.

REPLY APPENDIX F

From: [Military Commission Presiding Officer]
Sent: Wednesday, July 28, 2004 13:06
To: OMC-D LCDR Sundel [detailed defense counsel]
Subject: Authority of the Presiding Officer

LCDR Sundel,

1. In a telephone conference this morning, you generally refused to a) talk to me or b) answer questions. You stated that you did not believe I have the authority to conduct pretrial matters absent the entire commission, although you did acknowledge that I am, in fact, detailed to the case of Al Bahlul as the Presiding Officer. Further, despite the fact that you had your co-counsel, MAJ Bridges, opposing counsel, and the Chief Defense Counsel, COL Gunn, present while you were talking with me on speaker phone, you kept insisting that the substance of the conversation be placed on record. Until such time as you are able to convince me, or have superior competent authority tell me, that my interpretation of the law is incorrect as to my authority to manage pretrial and motions practice without the presence of the full Commission, you will follow my instructions and orders in that regard. If I am incorrect in the exercise of my authority or otherwise err, there is an Appointing Authority and Review Panel to whom you may address the matter. It cannot be, and it will not be, that a counsel can refuse to discuss a matter - or litigate a matter - on the claim the Presiding Officer has no authority thereby preventing the discussion and litigation of the very issue....

5. I am now giving you a order. The order is for you to provide notice of motions by COB 28 July 2004. You have several options:

a. You can obey the order.

b. You can state that you refuse to obey this order subjecting you to proper sanction.

c. You can request an extension of time to a date certain.

d. You can email me the following: I have been detailed to the case of Al Bahlul since February 2004. There are no matters of which I or my co-counsel am aware concerning which I intend to raise a motion before the Commission, or have reason to believe will or may be raised.

6. If you choose option 5b, I hereby direct you to furnish your reasons to me.

7. You are further ordered to submit to me by 1200 hours, 29 July 2004, your legal analysis concerning why you believe that the Presiding Officer in a military commission can not handle pretrial matters without the presence of the entire commission notwithstanding MCI #8, Section 5...

Presiding Officer

REPLY APPENDIX G

From: Sundel, Philip, LCDR, DoD OGC
To: [Presiding Officer]
Subject: RE: Authority of the Presiding Officer
Date: Wednesday, July 28, 2004 4:18 PM

To the extent that the order and deadline communicated in paragraph 5, below, has been imposed by the military commission as a whole, I respectfully request of the military commission as a whole an extension of time to provide a notice of motions until after counsel detailed to represent Mr. al Bahlul have had an opportunity to establish contact with him again. The necessity for this request is contained in the memorandum provided by Major Bridges on 23 July. Unfortunately, because I do not know when we will be able to again establish contact with Mr. al Bahlul I am unable to provide a date certain for the expiration of the requested extension. I will notify the commission once we are able to establish contact with Mr. al Bahlul again.

V/r

LCDR Sundel
Detailed Defense Counsel

* * *

From: [Presiding Officer]
Sent: Wednesday, July 28, 2004 18:08

Subject: Notice of Initial Sessions

TO All Counsel:
1. The Presiding Officer will convene the Commission (without members) in the cases of:
UNITED STATES v. IBRAHIM AHMED MAHOUD AL QOSI
UNITED STATES v. ALI HAMZA AHMAD SULAYMAN AL BAHLUL
UNITED STATES v. SALEM AHMED SALEM HAMDEN

UNITED STATES v. DAVID HICKS
during the week of 23 August at GTMO. A schedule for the proceedings during that week will be published at a later date.
2. During these sessions, the Accused and all Counsel will be present. After the convening of the commission in each case, counsel will be permitted to voir dire the Presiding Officer, and all motions and matters that can be resolved will be resolved...

REPLY APPENDIX H

From: [Presiding Officer]
Sent: Wednesday, July 28, 2004 22:03

Subject: Counsel and the Authority of the Presiding Officer

Memorandum For: COL Gunn, Chief Defense Counsel
28 July 2004

Subject: Counsel and the Authority of the Presiding Officer

...2. It has come to my attention (e.g., see Incl 2 - Email from LCDR Sandul [Sundel], 28 Jul 04) that certain counsel may be operating under a misapprehension concerning my authority as the Presiding Officer. Please note that this memorandum does not specifically address any case or any counsel - it covers all four of the cases to which I have been detailed and all of the counsel, whether prosecution or defense, detailed to those cases.

3. So that there is no question of my view in these matters, let me state the following:

a. I have the authority to set, hear, and decide all pretrial matters.
b. I have the authority to order counsel to perform certain acts.
c. I have the authority to set motions dates and trial dates.
d. I have the authority to act for the Commission without the formal assembly of the whole Commission.

The above listing is not supposed to be all inclusive. Perhaps a better way of looking at the matter is to say that I have authority to order those things which I order done.

4. I base my view upon my reading and interpretation of the references. (I note that my analysis of the references

comports with that contained in reference 1l.) I recognize that any one person's interpretation of various documents might be wrong. However, in the cases to which I have been appointed as Presiding Officer, my interpretation is the one that counts:

a) until the cases have been resolved and the cases are reviewed, if necessary, by competent reviewing authority (See reference 1k.). At that time, there will be an opportunity for advocates, for either side, to state that the Presiding Officer was wrong in his interpretation of the references or in his actions based upon those interpretations. If so, competent reviewing authority will determine the remedy, if any. Or,
b) until superior competent authority (The President, The Secretary of Defense, The General Counsel of the Department of Defense, The Appointing Authority) issues directives stating that what I am doing is incorrect.

...

Presiding Officer

REPLY APPENDIX I

10 Aug 2004

MEMORANDUM FOR THE OFFICE OF THE APPOINTING AUTHORITY

FROM: Lieutenant Commander Charles D. Swift, JAGC, USN, Detailed Defense Counsel, *United States v. Hamdan*

SUBJECT: Powers of the Presiding Officer

Purpose: The purpose of this memorandum is to inform the Appointing Authority of Detailed Defense Counsel's objections regarding the Assistant to the Presiding Officer's request to the Appointing Authority on behalf of the Presiding Officer for revision of Military Commission Instruction No. 8 (attached). This memorandum seeks to cognizance the Presiding Officer's purported authority to exercise de facto powers of a military judge in contravention of the powers prescribed under Commission rules, historical precedence, and promotion of a full and fair trial. In addition to alerting the Appointing Authority to Detailed Defense Counsel's objections, this memorandum proposes alternative solutions in regards to the commission of Salim Ahmed Hamdan. Objections and recommendations raised in this memorandum are solely that of Detailed Defense Counsel in Military Commission proceedings in conjunction with Salim Ahmed Hamdan and do not represent the position of the Chief Defense Counsel or the Defense teams, military or civilian, in any other Commission.

Issue: Under the President's Military Order, subsequent military orders and instructions, and legal president, do Military Commission proceedings conducted outside the presence of the other commission members constitute a lawfully constituted tribunal, when the proceedings are conducted by the Presiding Officer for the purpose of resolving legal motions; witness and evidentiary issues?

Discussion: The Presiding Officer's proposed actions contrast with the President's Military Order of November 13, 2001, dictating that the Military Commission provide "a full and fair trial with the Military Commission sitting as triers of both law and fact," and Military Commission Order No. 1, Section 4.A.1, that states "members shall attend all sessions of the Commission." The Presiding Officer's power under MCO No. 1 is administrative rather than substantive (e.g. limited to the preliminary admission of evidence, subject to review of panel members, maintaining the discipline of proceedings, ensuring qualifications of attorneys, scheduling, certifying interlocutory questions[22], determining the availability of witnesses, etc.) See sections 4.A, 5.H, 6.A.5, and 6.D.1, 6.D.5. Nothing in the powers set out in either the President's Military Order or the MCO No. 1 suggest that the Presiding Officer's powers extend to that of a military judge, capable of holding independent sessions.

In creating the present Military Commissions the government has relied on the legal and historical principles set out *in re Quirin*. The Quirin Commission, however, was conducted for all sessions with the Military Commissions as a whole, hearing all questions of law and fact. These included questions of the Commissions including questions of whether counsel had the right to preemptory challenge, jurisdiction, lawfulness of the Presidential order, and lawfulness of the charges. (See pages 15-18, 23-39, and 46-60 of Transcript of Proceedings Before the Military Commissions to Try Persons Charged with Offenses against the Law of War and the Articles of War, Washington, D.C., July 8 to July 31, 1942, University of Minnesota, 2004, Editors, Joel Samaha, Sam Root, and Paul Sexton). Indeed the Detailed Defense Counsel has been able to find no previous Military Commission that was conducted in the manner proposed by the Presiding Officer.

---

[22] The requirement under Section 4.A.(5)(d) of MCO 1, that the Presiding officer certify all dispositive motions to the Appointing Authority conflicts with the plain language of the Presidential order that the Commission be the "triers of law and fact" and is likely invalid under section 7.B. of MCO 1.

The conduct of Military Commission sessions outside the presence of all members does not comport with the overriding objective that the Commission provide a full and fair trial. By acting as a de facto military judge in these proceedings, the Presiding Officer runs a high risk in prejudicing the panel as a whole. In essence what the Presiding Officer proposes is that he alone will make determinations regarding legal motions, such as but not limited to the legality of the Commission, the elements of the charges, issues of voluntariness of confessions, relevance of witnesses and those facts that are not subject to contention. In order to make these determinations the Presiding Officer will necessarily have to make findings of fact in addition to determining the law. By assuming the role of an independent fact finder and law giver, the Presiding Officer elevates his status relative to the other members to a point that it cannot be reasonably expected that his opinions will not be given undue weight by the other members during deliberations. It cannot be reasonably expected that after the Presiding Officer has independently heard evidence, determined the law, and conducted a portion of the proceedings outside the presence of the other members that they will not subsequently defer to his judgment during deliberations. Such a system is not in keeping with the requirement that the proceedings be full and fair. For the process to be full and fair, each member must have an equal voice. The Presiding Officer, however, in the name of expediency proposes to make himself first among equals.

Even if the Appointing Authority agrees with the Presiding Officer's position regarding alteration of MCI No. 8, Detailed Defense Counsel objects to any alterations to military instructions without the concurrence of Mr. Hamdan and his Defense Counsel as an expos facto alteration of the procedures for trial after charges have been referred to Commission, thereby commencing proceedings.

Detailed Defense Counsel is not unmindful of the difficulties associated with the use of members to make all of these determinations. The Presiding Officer's assistant in his ex parte memorandum to the Legal Advisor to the

Appointing Authority, points out that the use of members to make determinations on all issues substantially mirrors the court-martial process prior to the institution of the Uniform Code of Military Justice. Although this process was abandoned with the advent of the Uniform Code of Military Justice for Courts-martial, there is no authority for abandoning it with respect to Military Commissions. Nothing in the President's order indicated that he tended to deviate from the past process; rather the portion of the President's Military Order of November 13, 2001, dealing with Military Commissions, is an almost word for word that of President Roosevelt's orders regarding the Quirin Commission.

Mr. H.'s memo justifies the departure from historical precedent on the grounds that requiring line officers to vote on complex issues few lawyers can articulate jeopardizes efficient trials and potentially prejudices the proceedings. Detailed Defense Counsel agree that line officers will be confronted with extremely complex issues, but does not agree that the solution lies in granting judicial powers to the Presiding Officer in a hearing that is distinctly separate from a courts-martial or federal trail

Recommendation: Detailed Defense Counsel proposes in the alternative that recent procedures used in international tribunals for war crimes provide the solution. In both the former Yugoslavia and Rwandan tribunals, the war crimes tribunals have been composed of international judges. Detailed Defense counsel recommends that the Appointing Authority reject the Presiding Officers interpretation of his powers and clarify that all sessions of the Military Commission shall be attended by all members of the commission. Further, Defense Counsel recommends that the Appointing Authority relieve the line officers appointed to serve as members of the commission and appoint in the alternative active or reserve Judge Advocates who are qualified to serve as military judges. Appointment of a panel of judge advocates does not require a change in the Military Commission rules as there is no requirement that a commission member be anything beyond a commissioned officer. Appointment of judge advocates to

the commissions will permit careful consideration of the legal issues, expedite necessary legal research into these issues, avoid prejudice created by ex parte proceedings, and mirror international process.

LCDR Charles D. Swift, JAGC, USN
Detailed Defense Counsel
Office of Military Commissions

Cc:
Chief Defense Counsel
Chief Prosecutor
Presiding Officer
Detailed Prosecutor in *U.S. v. Hamdan*
Legal Advisor to the Appointing Authority
Legal Advisor to the Presiding Officer

REPLY APPENDIX J

August 11, 2004

MEMORANDUM FOR Presiding Officer

SUBJECT: Presence of Members and Alternate Members at Military Commission Sessions

The Orders and Instructions applicable to trials by Military Commission require the presence of all members and alternate members at all sessions/proceedings of Military Commissions.

The President's Military Order (PMO) of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," requires a full and fair trial, with the military commission sitting as the triers of both fact and law. See Section 4(c)(2). The PMO identifies only one instance in which the Presiding Officer may act on an issue of law or fact on his own. Then, it is only with the members present that he may so act and the members may overrule the Presiding Officer's opinion by a majority of the Commission. See Section 4"c)(3).

Further, Military Commission Order (MCO) No. 1 requires the presence of all members and alternate members at all sessions/proceedings of Military Commissions. Though MCO No. I delineates duties for the Presiding Officer in addition to those of other Commission Members, it does not contemplate convening a session of a Military Commission without all of the members present.

The "Commission" is a body, not a proceeding, in and of itself. Each Military Commission, comprised of members, collectively has jurisdiction over violations of the laws of war and all other offenses triable by military commission. The following authority is applicable.

• MCO No. 1, Section 4(A)(l) directs that the Appointing Authority shall appoint the members and the alternate member or members of each Commission. As such, the appointed members and alternate members collectively make up each "Commission."

• MCO No. 1, Section 4(A)(I) also requires that the alternate member or members shall attend all sessions of the Commission. This requirement for alternate members to attend all sessions assumes that members are required to attend all sessions of the Commission, as well.

• MCO No. 1. Section 4(A)(4) directs the Appointing Authority to designate a Presiding Officer from among the members of each Commission. This is further evidence that the Commission was intended to operate as an entity including all of the members.

• MCO No. 1, Section 4(A)(4) also states that the Presiding Officer will preside over the proceedings of the Commission from which he or she was appointed. Implicit in this statement is the understanding that there are no proceedings without the Commission composed of and operating with all of its members. The Presiding Officer is only one of the appointed members to the Commission, who in addition, presides over the proceedings of the Commission.

Thomas L. Hemingway,
Brigadier General, U.S. Air Force
Legal Advisor to the Appointing
Authority for Military Commissions

REPLY APPENDIX K

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Hamdan v. Rumsfeld, et al.
No. 04-5393

MOTION TO STAY THE COURT'S MANDATE PENDING DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI

...

1. The Equities Favor a Stay and Mr. Hamdan Will Suffer Irreparable Injury if the Stay is Denied.

There is good cause to stay the mandate in this case, whether that cause is measured by the public interest favoring a stay or the irreparable harm that will occur to Mr. Hamdan if the mandate is issued. Fed. R. App. P. 41(d)(2); D.C. Cir. R. 41(a)(2); *Books* 329 F.3d at 829; *Postal Service*, 481 U.S. at 1302-03. Harm to the public interest shifts the equities heavily in favor of a stay. *Books*, 329 F.3d at 829; *Postal Service*, 481 U.S. at 1302-03.

Certainly, neither the public interest nor the interested parties will be harmed by the temporary maintenance of the status quo. On the contrary, it is the prospect of rushed proceedings posed by the denial of this motion that threatens to harm both groups. Absent a stay, these military commissions - widely decried as unjust throughout the international community, even among America's friends and allies - will move forward without the benefit and imprimatur of Supreme Court review. Staying the mandate will allow the Supreme Court to consider and address Mr. Hamdan's fundamental challenges to these commissions, and will give credence and support to the

perception here and abroad that *all* criminal proceedings conducted by the United States are subject to full judicial review and are governed by the rule of law.

Moreover, issuance of the mandate prior to Supreme Court review presents a panoply of irreparable harms to Mr. Hamdan: he will be forced to preview his defense to the prosecution; he will be forced to defend in a proceeding where he challenges the very jurisdiction of the commission to try him at all; he may be returned to solitary confinement during pre-commission detention (a form of detention that will impair his ability to defend himself once the commission resumes); and it may interfere with his ability to complete briefing at the Supreme Court. Given these compound harms, and the lenient standard by which "irreparable injury" is measured on a motion to stay a mandate, a stay is amply warranted in this case. *Books*, 329 F.3d at 829; *Postal Service*, 481 U.S. at 1302-03.

a. The equities and public interest strongly favor a stay.

There is great potential harm to the public interest if these commissions are allowed to proceed before there is a meaningful opportunity for Supreme Court review. Fed. R. App. P. 41(d)(2); D.C. Cir. R. 41(a)(2); *Books*, 329 F.3d at 829. Rushed proceedings would undermine the legitimacy of the Government's actions in Guantanamo and confuse and possibly delay the Supreme Court's review of this case. *See generally Quirin*, 317 U.S. at 19 (finding that the public interest required that the Court avoid all delay in reaching the merits of a challenge to military commissions).

The harm to the public interest in this case is not ephemeral or undefined - military commissions that flout the protections afforded by the Geneva Conventions bring the scorn of the international community and endanger the lives of U.S. servicemen and civilians captured and detained abroad. Amicus Brief of General David M. Brahms, et al., *supra*, at 5-10. The public interests implicated here are at

least as strong as the interests found in other cases where the mandate has been stayed. *Books*, 239 F.3d at 829 (mandate stayed because public interest would be harmed if the city of Elkhart, Indiana, had to "devote attention to formulating and implementing" city policy regarding public display of religious symbols without the benefit of Supreme Court review). Allowing the Supreme Court the time it needs to review these proceedings would benefit the public interest by helping to clarify and legitimize the proceedings in Guantanamo. *See Quirin*, 317 U.S. at 19 (observing, in case raising similar issues, that "public interest required that we consider and decide these questions without any avoidable delay."); *see also* Slip Op. at 6 ("[W]e are thus left with nothing to detract from *Quirin*'s precedential value.").

Moreover, the potential harm to the public interest is not offset by any harm to the Government if Mr. Hamdan's military commission is very briefly delayed. The Government's actions during Mr. Hamdan's detention clearly reveal that it does not consider delay harmful, and that immediate proceedings are not necessary to protect the Government's interests. Mr. Hamdan has been in the custody of the U.S. military since approximately November 2001, but wasn't declared eligible for trial by military commission until July 3, 2003. He then languished in pre-trial segregation (*i.e.*, solitary confinement) for nearly nine months. Mr. Hamdan was not able to meet with his counsel until January 30, 2004. After Mr. Hamdan's counsel filed his mandamus and habeas action the Government moved to hold Mr. Hamdan's petition in abeyance. *See* Notice of Motion and Motion for Order Holding Petition in Abeyance (filed April 23, 2004, D.D.C. docket no. 1).[23]

---

[23] In support of its Motion to Hold in Abeyance, the Government invoked the importance and finality of Supreme Court review. *Id.* at 4 ("[I]t would be an unnecessary expenditure of resources for the parties to litigate – and for [the district court] to adjudicate – the very same jurisdictional issues the Supreme Court is virtually certain to address over the next two months and resolve in a manner that will dispose of this

It was not until the Supreme Court ruled that habeas jurisdiction extended to Guantanamo Bay in *Rasul* on June 28, 2004, that the Government finally presented Mr. Hamdan with the charge against him, a fortnight later, in July, 2004. In November 2004 when the D.C. District Court halted Mr. Hamdan's commission, the Government never sought a stay of the district court injunction, despite its stated promise to do so. *See* DOJ Press Release, Nov. 8, 2004, *available at* http://www.usdoj.gov/opa/pr/2004/November/ 04_opa_735.htm. Following this injunction the government *on its own accord* suspended proceedings in the three other cases pending before Military Commissions. The Government has never sought a speedy commission for Mr. Hamdan, and it has no equitable claim to seek one now.

Moreover, granting a stay merely preserves this status quo, a state of affairs that the Government accepted in November and which has been in place for over eight months. Under the District Court's order, Mr. Hamdan still remains subject to the threat of both military (court-martial) and civil (Article III court) prosecutions for his alleged past violations of the laws of war. He will not, moreover, be free on bail in the interim, but rather detained at Guantanamo Bay. The Supreme Court has held that in habeas cases the possibility of flight and danger to the public – neither of which exists in this case – are both relevant factors for courts to consider in granting stays. *See Hilton v. Braunskill*, 481 U.S. 770, 777 (1987) (remanding for reconsideration of the government's motion for a stay). Finally, the public interest would be harmed if a hastily convened commission was permitted to go forward prior to an opportunity for Supreme Court review.[24]

---

petition or, at a minimum, provide substantial guidance regarding its viability in the federal courts[.]").

[24] Indeed, if expediency was truly an important goal for the Government, its decision to prosecute Mr. Hamdan via this commission—rather than, for example, a court-martial—is entirely illogical. *See* 10 U.S.C. § 818 (permitting trial by the existing system of

b. Mr. Hamdan will be irreparably injured if the stay is denied.

There is also good cause to stay the mandate because Mr. Hamdan will be irreparably injured if his commission is allowed to go forward without Supreme Court review. Fed. R. App. P. 41(d)(2); D.C. Cir. R. 41(a)(2); *Postal Service*, 481 U.S. at 1302-03. There are at least three concrete harms to Mr. Hamdan that demonstrate irreparable injury sufficient to stay the mandate. *Postal Service*, 481 U.S. at 1302-03 (harm requirement satisfied where temporary reinstatement of discharged employee will send a negative message to other employees).

First, the right Mr. Hamdan seeks to vindicate is the right not to be tried at all by this military commission. If the mandate issues before the Supreme Court has the opportunity to review Mr. Hamdan's case, the trial proceedings will resume where they left off. Mr. Hamdan will be asked to enter a plea pursuant to rules that do not facially permit *Alford* or conditional pleas. Substantial aspects of the rights Hamdan asserts in this petition will be vitiated by the resumption of the trial, and they will be impossible for the federal courts to fully vindicate *ex post*. Likewise, issuance of the mandate before Supreme Court resolution would subject Hamdan to trial by military commission even as he presses his challenge in Article III courts to the jurisdiction of those commissions to try him. *Cf. Gilliam v. Foster*, 75 F.3d 881, 904 (4th Cir. 1996) (en banc) ("[A] portion of the constitutional protection [the Double Jeopardy Clause] affords would be irreparably lost if Petitioners were forced to endure the second trial before seeking to vindicate their constitutional rights at the federal

---

courts-martial and conferring jurisdiction over violations of the laws of war); *id.* § 810 ("When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.").

level." (quoting *Abney v. United States*, 431 U.S. 651, 660 (1997)).

In this respect, the issue is the same as that governing abstention, where the Court in this case has already concluded that "setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction." Slip op. at 6 (citing *Abney*, 431 U.S. at 662); *cf. McSurely v. McClellan*, 697 F.2d 309, 317 (D.C. Cir. 1982) ("A showing of irreparable injury will generally be automatic from invocation of the immunity doctrine if the trial has begun or will commence during the pendency of the petitioner's appeal.").

Second, if the mandate issues before Supreme Court review and the commission resumes, it will irreversibly provide the prosecution a preview of Mr. Hamdan's trial defense. This Circuit has already acknowledged this as an irreparable injury, and in a context that involved simple exclusion from the United States in immigration proceedings, and not the far more burdensome and stigmatizing possibility of a criminal conviction with life imprisonment. In *Rafeedie v. INS*, 880 F.2d 506, 517 (D.C. Cir. 1989), then-Judge Douglas Ginsburg pointed to the "substantial practical litigation advantage" forfeited by forcing the petitioner to go through a summary exclusion proceeding when he claimed he was entitled to a more robust plenary procedure. The Government had argued that he should go through the summary proceeding first, and only if excluded should he be able to challenge the process. This Court disagreed due to the irreparable injury engendered by forcing a preview of the defense:

> Rafeedie will suffer a judicially cognizable injury in that he will thus be deprived of a "substantial practical litigation advantage." Rafeedie spells out this dilemma: if he presents his defense in a § 235(c) proceeding, and a court later finds that section

> inapplicable to him, the INS will nevertheless know his defense in advance of any subsequent § 236 proceeding; if, however, he does not present his factual defense now, he risks forsaking his only opportunity to present a factual defense. . . Rafeedie has thus established a *significant and irreparable injury.*

Id. at 518 (emphasis added). *Cf. United States v. Philip Morris Inc.*, 314 F.3d 612, 622 (D.C. Cir. 2003) (granting a stay upon finding that "the general injury caused by the breach of the attorney-client privilege and the harm resulting from the disclosure of privileged documents to an adverse party is clear enough" to satisfy the irreparable injury prong).

Third, if the mandate issues, Judge Robertson's injunction barring Mr. Hamdan's continued placement in solitary confinement will cease. Mr. Hamdan has already been subject to eleven months of solitary confinement, and, as the only evidence relevant to this issue and in the record confirms, continued solitary confinement threatens Mr. Hamdan's health and ability to defend himself at trial. *See* Brief of Amici Curiae Human Rights First, Physicians for Human Rights, *et al*, in Support of Petitioner at 9-18 (solitary confinement seriously impairs an ability to defend, and Mr. Hamdan is vulnerable to the consequences of solitary confinement). The harm to Mr. Hamdan's ability to defend himself by a return to solitary confinement is at least as harmful as the symbolic harms held to favor a stay in other cases. *Postal Service*, 481 U.S. at 1302-03 (equities favor stay where employer will face irreparable harm because "temporary reinstatement of [a discharged employee], a convicted criminal, will seriously impair the applicant's ability to impress the seriousness of the Postal Service's mission upon its workers.").

Fourth, if this Court does not grant a stay, there is a possibility that Mr. Hamdan's trial proceedings at

Guantanamo may occur at the same time as his Reply Brief in the Supreme Court is due. Because commission proceedings have not been scheduled, it is impossible to know whether this possibility will materialize. If it does, Petitioner cannot hope to adequately pursue his claims simultaneously in both Washington and Cuba, given the amorphous and uniquely difficult nature of the proceedings in Guantanamo and the lack of sufficient access to research materials and law libraries. Both Mr. Hamdan and the judicial branch will suffer if the petitioner in such a pivotal case cannot pursue his claims with the utmost vigor. Indeed, the Government itself suffers in that scenario, given its interest in making sure that the proceedings in Guantanamo command the respect of the international community and of its own citizens.

In sum, if military commissions are worth conducting, they are worth conducting lawfully and being *perceived* as so conducted. Their deployment in jurisdictionally dubious contexts or in legally clouded conditions can only work a disservice to their potential utility when confined to proper circumstances and conducted under legally appropriate ground rules. Only the Supreme Court's prompt and decisive resolution of the questions presented by the use of military commissions in the circumstances of this case can dispel those clouds swiftly and with the certitude that those conditions require.

Petitioner has acted with the utmost of dispatch to ensure that the Supreme Court can resolve his Petition at its first available date, the first Conference, on September 26, 2005. Accordingly, only a brief stay is necessary.

CONCLUSION

For all the foregoing reasons, the Motion should be granted and this Court's mandate should be stayed pending the Supreme Court's review of Mr. Hamdan's Petition for Certiorari.

Respectfully submitted this 11th day of August, 2005.

/s/ Neal Katyal
Neal Katyal (D.C. Bar No. 462071)
600 New Jersey Avenue, NW
Washington, D.C. 20001
(202) 662-9000

Lt. Commander Charles D. Swift
Office of Military Commissions
U.S. Department of Defense
1931 Jefferson Davis Hwy. Suite 103
Arlington, VA 22202
(703) 607-1521

Benjamin S. Sharp (D.C. Bar No. 211623)
Joseph M. McMillan (*pro hac vice*)
PERKINS COIE LLP
607 Fourteenth Street, N.W., Suite 800
Washington, D.C. 20005-2011
(202) 628-6600
(202) 434-1690 (facsimile)
Attorneys for ~~Petitioner~~

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Hamdan v. Rumsfeld, et al.

No. 04-5393

REPLY IN SUPPORT OF MOTION TO STAY THE COURT'S MANDATE PENDING DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI

B. Mr. Hamdan Has Demonstrated Good Cause for a Stay.

The Government argues that there is not good cause for

a stay because (1) "the government and the public interest" will suffer; and (2) Mr. Hamdan will not be prejudiced if the mandate issues. These arguments lack factual and legal support, and are contradicted by the Government's prior actions.

1. There will be no harm to the Government or to any public interest if the mandate is stayed. Despite the brief stay sought in this motion, the Government nonetheless asserts that both it and an unspecified "public interest" will be harmed by this stay. First, the Government complains that the District Court's injunction constitutes "unwarranted interference" with the President's powers. Resp. at 13. This argument simply restates the Government's merits position in the case, but it does not articulate any harm to the President or the Government that a brief stay of the mandate will engender.

Next, the Government invokes "serious practical consequences" that would flow from staying the mandate. Resp. at 14. It claims that "unduly delayed [] commission proceedings" may dilute the alleged deterrent effect it contends Mr. Hamdan's commission will have. *Id.* at 14. It is incredible that the Government would, in light of the history of its treatment of Mr. Hamdan, now complain of undue delay.[25] Mr. Hamdan's Motion set forth a brief chronology of this delay, Motion at 14-15, a list that was by no means exhaustive and that the Response did not contest. Some of the more telling examples that belie the Government's claim of harm caused by delay are: (1) Mr. Hamdan has been detained since November 2001, the President did not declare Mr. Hamdan eligible for trial by military commission until July 3, 2003, and Mr. Hamdan was not charged with any offense until July 13, 2004; (2) in the nine months since the District Court's November 8, 2004

---

[25] Mr. Hamdan agrees that the international community is observing and scrutinizing the Government's use of commissions, but he disagrees that the Government has thus far ever chosen a course of action that suggests it intends to conduct his commission quickly, openly, or fairly.

Order, the Government has not referred charges against any of the other fourteen persons designated as eligible for trial by military commissions, and has released three of them. This "undue delay" is an argument of convenience, and it should be viewed in light of the Government's actions, not its words.

2. Mr. Hamdan will be harmed if the mandate issues. The Government contends that because Mr. Hamdan's opening Petition "did not raise any legal challenge to his detention as an enemy combatant" the Government can, at its leisure, detain Mr. Hamdan indefinitely regardless of Supreme Court intervention. Resp. at 10-11. The Government is simply wrong. Mr. Hamdan *did* challenge both procedurally and substantively the determination that he is an enemy combatant, which is the predicate for the indefinite detention the Government threatens. *See* Petition for Writ of Mandamus or, in the Alternative, Writ of Habeas Corpus at 25. And the claim that Hamdan will remain detained cannot be assumed in light of the appeal pending before this Circuit in *Al Odah, supra*.

In a complete contradiction of its argument that the commissions must resume immediately, the Government next argues that Mr. Hamdan's trial will not begin after the mandate issues. Resp. at 11. Of course, even at the outset of the pre-trial motions, Mr. Hamdan will be asked to enter a plea of guilt or innocence. And the indefinite time for commencement of Mr. Hamdan's commission - something which lies completely within the Government's hands - belies the Government's argument that the mandate must issue now.

Finally, the Government attempts to dismiss Mr. Hamdan's claim that he will be harmed if his commission resumes. These attempts to rebut Mr. Hamdan's satisfaction of the "good cause" requirement

are not well supported.[26] First, Mr. Hamdan asserts that this military commission has no jurisdiction to try him, and contrary to the Government's assertion that right is not abstract and cannot be vindicated with post-trial review. Slip op. at 6. Second, this Court has explicitly held elsewhere that being forced to preview a defense does indeed constitute irreparable harm, even though the Government, citing no authority, scoffs at the notion. *Rafeedie v. INS*, 880 F.2d 506, 517 (D.C. Cir. 1989). This concern is particularly heightened here because Mr. Hamdan contends that this military commission does more than "arguably violate...procedural rights." Resp. at 12. Rather, it has procedures that are specifically engineered to violate those rights by permitting Mr. Hamdan's exclusion from his own trial. This increases the likelihood of a second trial, and heightens the potential harm to Mr. Hamdan of previewing his defense. *Rafeedie* fully controls this case.

Third, the Government's assurance that it has no "current plans" to return Mr. Hamdan to solitary confinement is no assurance at all, as it does not prevent the Government from placing Mr. Hamdan back in solitary confinement when his commission re-commences. Last, facilities in Guantanamo Bay do not permit the kind of instant communication needed to litigate two cases in two fora simultaneously, which is what Mr. Hamdan will have to do if the mandate issues, and the prospect of doing so need not be "insurmountable" to satisfy good cause. Again, any one of these harms satisfies "good cause" as that requirement has been interpreted under Fed. R. App. P. 41(d)(2). *Postal Service v. Nat'l Assn. of Letter Carriers*, 481 U.S. 1301, 302-03 (1987); *Books v. City of Elkhart*, 239 F.3d 826,

---

[26] In fourteen pages of briefing, the Government fails to cite a single case that establishes the showing necessary to stay a circuit court's mandate pending a petition for certiorari under Fed. R. App. P. 41(d)(2). This includes a lack of any legal authority supporting its assertions that Mr. Hamdan has failed to establish "good cause" as it has been interpreted by courts.

829 (7th Cir. 2001).

CONCLUSION

For all the foregoing reasons, the Motion should be granted.

Respectfully submitted this
29th day of August, 2005.

/s/ Neal Katyal
Neal Katyal (D.C. Bar No. 462071)
600 New Jersey Avenue, NW
Washington, D.C. 20001
(202) 662-9000

Lt. Commander Charles D. Swift
Office of Military Commissions
U.S. Department of Defense
1931 Jefferson Davis Hwy. Suite 103
Arlington, VA 22202
(703) 607-1521

Benjamin S. Sharp (D.C. Bar No. 211623)
Joseph M. McMillan (*pro hac vice*)
PERKINS COIE LLP
607 Fourteenth Street, N.W., Suite 800
Washington, D.C. 20005-2011
(202) 628-6600
(202) 434-1690 (facsimile)
Attorneys for Petitioner

REPLY APPENDIX L

December 5, 2001

The Honorable Patrick J. Leahy
Chairman, Senate Judiciary Committee
433 Russell Senate Office Bldg.
United States Senate
Washington, DC 20510

Dear Senator Leahy:

We, the undersigned law professors and lawyers, write to express our concern about the November 13, 2001, Military Order, issued by President Bush and directing the Department of Defense to establish military commissions to decide the guilt of non-citizens suspected of involvement in terrorist activities.

The United States has a constitutional court system of which we are rightly proud. Time and again, it has shown itself able to adapt to complex and novel problems, both criminal and civil. Its functioning is a worldwide emblem of the workings of justice in a democratic society.

In contrast, the Order authorizes the Department of Defense to create institutions in which we can have no confidence. We understand the sense of crisis that pervades the nation. We appreciate and share both the sadness and the anger. But we must not let the attack of September 11, 2001 lead us to sacrifice our constitutional values and abandon our commitment to the rule of law. In our judgment, the untested institutions contemplated by the Order are legally deficient, unnecessary, and unwise.

In this brief statement, we outline only a few examples of the serious constitutional questions this Order raises:

• The Order undermines the tradition of the Separation of Powers. Article I of the Constitution provides that the Congress, not the President, has the power to "define and punish . . . Offenses against the Law of Nations." The Order, in contrast, lodges that power in the Secretary of Defense, acting at the direction of the President and without Congressional approval.
• The Order does not comport with either constitutional or international standards of due process. The President's proposal permits indefinite detention, secret trials, and no appeals.
• The text of the Order allows the Executive to violate the United States' binding treaty obligations. The International Covenant on Civil and Political Rights, ratified by the United States in 1992, obligates State Parties to protect the due process rights of all persons subject to any criminal proceeding. The third Geneva Convention of 1949, ratified by the United States in 1955, requires that every prisoner of war have a meaningful right to appeal a sentence or a conviction. Under Article VI of the Constitution, these obligations are the "supreme Law of the Land" and cannot be superseded by a unilateral presidential order.

No court has upheld unilateral action by the Executive that provided for as dramatic a departure from constitutional norms as does this Order. While in 1942 the Supreme Court allowed President Roosevelt's use of military commissions during World War II, Congress had expressly granted him the power to create such commissions.

Recourse to military commissions is unnecessary to the successful prosecution and conviction of terrorists. It presumes that regularly constituted courts and military courts-martial that adhere to well-tested due process are unable to handle prosecutions of this sort. Yet in recent years, the federal trial courts have successfully tried and convicted international terrorists, including members of the al-Qaeda network.

It is a triumph of the United States that, despite the attack of September 11, our institutions are fully functioning. Even the disruption of offices, phones, and the mail has not stopped the United States government from carrying out its constitutionally-mandated responsibilities. Our courts should not be prevented by Presidential Order from visibly doing the same.

Finally, the use of military commissions would be unwise, as it could endanger American lives and complicate American foreign policy. Such use by the United States would undermine our government's ability to protest effectively when other countries do the same. Americans, be they civilians, peace-keepers, members of the armed services, or diplomats, would be at risk.

The United States has taken other countries to task for proceedings that violate basic civil rights. Recently, for example, when Peru branded an American citizen a "terrorist" and gave her a secret "trial," the United States properly protested that the proceedings were not held in "open civilian court with full rights of legal defense, in accordance with international judicial norms."

The proposal to abandon our existing legal institutions in favor of such a constitutionally questionable endeavor is misguided. Our democracy is at its most resolute when we meet crises with our bedrock ideals intact and unyielding.

Respectfully submitted,

Benjamin Aaron
Professor of Law Emeritus
University of California-Los Angeles
School of Law

Kenneth Abbott
Elizabeth Froehling Horner
Professor of Law and Commerce
Director, Center for International
and Comparative Studies
Northwestern University

Richard L. Abel
Visiting Professor, New York
University Law School

Connell Professor, University of California-Los Angeles School of Law

Khaled Abou El Fadl
Acting Professor
University of Califorina-Los Angeles School of Law

Bruce Ackerman
Sterling Professor of Law and Political Science
Yale Law School

Bryan Adamson
Associate Professor of Law
Case Western Reserve University School of Law

Raquel Aldana-Pindell
Assistant Professor of Law
University of Nevada-Las Vegas, William S. Boyd School of Law

Alison Grey Anderson
Professor of Law
University of California-Los Angeles School of Law

Michelle J. Anderson
Associate Professor of Law
Villanova University School of Law

Professor Penelope Andrews
City University of New York School of Law

Fran Ansley
Professor of Law
University of Tennessee College of Law

Keith Aoki
Associate Professor of Law
University of Oregon School of Law

Annette Appell
Associate Professor
University of Nevada-Las Vegas, William S. Boyd School of Law

Jennifer Arlen
Visiting Professor of Law
Yale Law School

Ivadelle and Theodore Johnson
Professor of Law & Business, USC Law School

Michael Asimow
Professor of Law Emeritus
University of California-Los Angeles School of Law

Barbara Atwood
Mary Anne Richey Professor of Law
University of Arizona, James E. Rogers College of Law

Michael Avery
Associate Professor
Suffolk Law School

Jonathan B. Baker
Associate Professor of Law
American University, Washington College of Law

Jack Balkin
Knight Professor of Constitutional Law and the First Amendment
Yale Law School

Susan Bandes
Professor of Law
DePaul University College of Law

Taunya Lovell Banks
Professor of Law
University of Maryland School of Law

Roger M. Baron
Professor of Law
University of South Dakota School of Law

Joseph Bauer
Professor of Law
University of Notre Dame School of Law

Linda M. Beale
University of Illinois College of Law

John S. Beckerman
Associate Dean for Academic Affairs
Rutgers School of Law - Camden

Leslie Bender
Associate Dean & Professor of Law
and Women's Studies
Syracuse University College of Law

Robert Bennett
George C. Dix Professor of
Constitutional Law
Northwestern University School of
Law

Morris D. Bernstein
Assistant Clinical Professor
University of Tulsa College of Law

Arthur Best
Professor of Law
University of Denver College of Law

Jerry P. Black, Jr.
Associate Clinical Professor
University of Tennessee College of
Law

Gary Blasi
Professor of Law
University of California-Los Angeles
School of Law

Cynthia Grant Bowman
Professor of Law
Northwestern University School of
Law

Francis A. Boyle
Professor of Law
University of Illinois College of Law

Lynn Branham
Visiting Professor of Law
University of Illinois College of Law

Pamela D. Bridgewater
Associate Professor of Law
American University, Washington
College of Law

Thomas F. Broden
Professor Emeritus
University of Notre Dame School of
Law

Mark S. Brodin
Professor of Law
Boston College Law School

Ralph Brill
Professor of Law
Chicago-Kent College of Law

Theresa J. Bryant
Executive Director and Director of
Public Interest, Career Development
Office
Yale Law School

Elizabeth M. Bruch
Practitioner-in-Residence
American University, Washington
College of Law

Robert A. Burt
Alexander M. Bickel Professor of
Law
Yale Law School

Emily Calhoun
Professor of Law
University of Colorado

Deborah Cantrell
Clinical Lecturer and Director of the
Arthur Liman Public Interest
Program
Yale Law School

Manuela Carneiro da Cunha
Professor, Department of
Anthropology and the College
University of Chicago

William M. Carter, Jr., Esq.
Assistant Professor of Law
Case Western Reserve University
School of Law

Douglas Cassel
Director, Center for International
Human Rights

Northwestern University School of Law

Anthony Chase
Center for International Studies
University of Chicago

Alan K. Chen
Associate Professor
University of Denver College of Law

Ronald K. Chen
Associate Dean for Academic Affairs
Rutgers School of Law - Newark

Paul G. Chevigny
Professor of Law
New York University School of Law

Gabriel J. Chin
Rufus King Professor of Law
University of Cincinnati College of Law

Hiram E. Chodosh
Professor of Law
Director, Frederick K. Cox
International Law Center
Case Western Reserve University
School of Law

Carol Chomsky
Associate Professor of Law
University of Minnesota Law School
Co-President, Society of American Law Teachers

George C. Christie
James B. Duke Professor of Law
Duke University School of Law

Michael J. Churgin
Raybourne Thompson Centennial Professor in Law
University of Texas School of Law

Kathleen Clark
Professor, Washington University School of Law

Roger S. Clark
Board of Governors Professor
Rutgers School of Law - Camden

Sarah Cleveland
Professor of Law
University of Texas School of Law

George M. Cohen
Professor of Law
University of Virginia

David Cole
Georgetown University Law Center

Melissa Cole
St. Louis University School of Law

Robert H. Cole
Professor of Law Emeritus
School of Law (Boalt Hall)
University of California at Berkeley

James E. Coleman, Jr.
Professor of the Practice of Law
Duke University Law School

Jules Coleman
Wesley Newcomb Hohfeld
Professor of Jurisprudence
Yale Law School

Frank Rudy Cooper
Assistant Professor of Law
Villanova University School of Law

Charlotte Crane
Professor of Law
Northwestern University School of Law

Cathryn Stewart Crawford
Assistant Clinical Professor
Northwestern University School of Law

Lisa A. Crooms
Associate Professor
Howard University School of Law

Jerome McCristal Culp
Professor of Law
Duke University Law School

Dennis E. Curtis
Clinical Professor of Law
Yale Law School

Molly D. Current
Visiting Assistant Professor of Law
Chicago-Kent College of Law

Harlon Dalton
Professor of Law
Yale Law School

Karen L. Daniel
Clinical Assistant Professor
Northwestern University School of Law

Thomas Y. Davies
Associate Professor of Law
University of Tennessee College of Law

Angela J. Davis
Professor of Law
American University, Washington College of Law

Ellen E. Deason
Associate Professor
University of Illinois College of Law

Judith E. Diamond
Associate Professor

Brett Dignam
Clinical Professor of Law
Yale Law School

Diane Dimond
Clinical Professor of Law
Duke University Law School

Don Doernberg
James D. Hopkins Professor of Law
Pace University School of Law

Peter A. Donovan
Boston College Law School

Michael B. Dorff
Assistant Professor
Rutgers School of Law - Camden

Norman Dorsen
Fred I. and Grace A. Stokes
Professor of Law
New York University School of Law

David M. Driesen
Associate Professor of Law
Syracuse University College of Law

Steven Duke
Professor of Law
Yale Law School

Melvyn R. Durchslag
Professor of Law
Case Western Reserve University School of Law

Fernand N. Dutile
Professor of Law
University of Notre Dame School of Law

Stephen Dycus
Professor of Law
Vermont Law School

Howard Eglit
Professor of Law
Chicago-Kent College of Law

Daniel C. Esty
Professor of Environmental Law and Policy
Yale University

Cynthia R. Farina
Professor of Law
Cornell Law School

Neal Feigenson
Professor of Law
Quinnipiac University

Professor Jay M. Feinman
Rugters School of Law - Camden

Stephen M. Feldman
University of Tulsa

Barbara J. Fick

Associate Professor of Law
University of Notre Dame School of Law

Matthew W. Finkin
Albert J. Harno Professor of Law
University of Illinois

David H. Fisher, Ph.D.
Professor of Philosophy
North Central College

Stanley Z. Fisher
Professor of Law
Boston, MA

Scott FitzGibbon
Professor of Law
Boston College Law School

Martin S. Flaherty
Professor of Law
Fordham Law School

Brian J. Foley
Widener University School of Law

Gregory H. Fox
Professor of Law
Chapman University School of Law
Orange, CA

Gary Forrester
Visiting Assistant Professor of Law
University of Illinois College of Law

Mary Louise Frampton
Director, Boalt Hall Center for Social Justice
University of California at Berkeley

Daniel J. Freed
Clinical Professor Emeritus of Law and Its Administration
Yale Law School

Eric Freedman
Professor of Law
Hofstra University School of Law

Peter B. Friedman
Director of Research, Analysis, and Writing
Case Western Reserve University School of Law

Nicole Fritz
Crowly Fellow in International Human Rights
Fordham School of Law

Joseph W. Glannon, Esq.

Maggie Gilmore
Supervising Attorney
Indian Country Environmental Justice Clinic
Vermont Law School

Peter Goldberger, YLS '75
Attorney, Ardmore, PA

Phyllis Goldfarb
Professor of Law
Boston College Law School

Carmen Gonzalez
Assistant Professor of Law
Seattle University School of Law

Jonathan Gordon
Instructor of Law
Case Western Reserve University School of Law

Robert Gordon
Johnston Professor of Law and History
Yale University

Neil Gotanda
Professor of Law
Western State University

Stephen E. Gottlieb
Professor of Law
Albany Law School

Grayfred B. Gray
Associate Professor Emeritus
University of Tennessee College of Law

Suzanne Greene
Visiting Professor of Law
Chicago-Kent College of Law

Kent Greenfield
Associate Professor
Boston College Law School

Susan R. Gzesh
Director, Human Rights Program
The University of Chicago

Elwood Hain
Professor, Whittier Law School
Colonel (JAG), USAFR (ret)

Louise Halper
Professor of Law
Washington & Lee University
School of Law

Robert W. Hamilton
University of Texas School of Law

Joel F. Handler
University of California-Los Angeles
School of Law

Hurst Hannum
Professor of International Law
The Fletcher School of Law and
Diplomacy
Tufts University

Patricia Isela Hansen
Professor of Law
University of Texas Law School

Angela Harris
Professor of Law
School of Law (Boalt Hall)
University of California at Berkeley

Mark I. Harrison, Esq.

Robert Harrison
Yale Law School

Melissa Hart
Associate Professor of Law
University of Colorado School of
Law

Kathy Hartman
Assistant Dean for Admissions and
Financial Aid
Vermont Law School

Lew Hartman
381 VT Route 66
Randolph, VT 05060

Philip Harvey
Associate Professor of Law &
Economics
Rutgers School of Law - Camden

Oona Hathaway
Associate Professor
Boston University School of Law

Joan MacLeod Heminway
University of Tennessee College of
Law

Lynne Henderson
Visiting Professor of Law
University of California-Davis
School of Law

Susan Herman
Professor of Law
Brooklyn Law School

Kathy Hessler
Case Western Reserve University
School of Law

Steven J. Heyman
Professor of Law
Chicago-Kent College of Law

Tracey E. Higgins
Professor of Law, Fordham Law
School
Co-Director, Crowley Program in
International Human Rights

Barbara Hines
Lecturer/Director of the
Immigration Clinic
University of Texas School of Law

W. William Hodes

President, The William Hodes
Professional Corporation
Professor Emeritus of Law, Indiana
University

Joan H. Hollinger
Visiting Professor of Law
Director, Child Advocacy Program
School of Law (Boalt Hall)
University of California at Berkeley

Ruth-Arlene W. Howe
Boston College Law School

Marsha Cope Huie
Visiting Professor of Law
Tulane University

Darren Lenard Hutchinson
Assistant Professor of Law
Southern Methodist University

Deena Hurwitz
Cover/Lowenstein Fellow in
International Human Rights Law
Yale Law School

Alan Hyde
Professor and Sidney Reitman
Scholar
Rutgers School of Law - Newark

Jonathan M. Hyman
Professor of Law
Rutgers School of Law - Newark

Allan Ides
Loyola Law School

Sherrilyn A. Ifill
Associate Professor of Law
University of Maryland School of
Law

Lisa C. Ikemoto
Professor of Law
Loyola Law School

Craig L. Jackson
Professor of Law
Texas Southern University,
Thurgood Marshall School of Law

Quintin Johnstone
Emeritus Professor of Law
Yale Law School

Paul W. Kahn
Robert W. Winner Professor of Law
and the Humanities
Yale Law School

David Kairys
James E. Beasley Professor of Law
Beasley School of Law, Temple
University

Amy H. Kastely
Professor of Law
St. Mary's University School of Law

Harriet N. Katz
Clinical Professor
Rutgers School of Law - Camden

Lewis R. Katz
John C. Hutchins Professor of Law
Case Western Reserve University
School of Law

Andrew H. Kaufman, Esq.

Eileen Kaufmann
Professor of Law
Touro Law School

Conrad Kellenberg
Professor of Law
University of Notre Dame School of
Law

Robert B. Kent
Professor Emeritus
Cornell Law School

Jeffrey L. Kirchmeier
Associate Professor of Law
City University of New York School
of Law

Kimberly Kirkland
Professor of Law
Franklin Pierce Law Center

Thomas Kleven
Professor of Law
Thurgood Marshall School of Law

Alvin K. Klevorick
John Thomas Smith Professor Law
Yale Law School

Harold Hongju Koh
Gerard C. and Bernice Latrobe
Smith Professor of International
Law

Yale Law School
Susan P. Koniak
Professor of Law
Boston University School of Law

Juliet P. Kostritsky
John Homer Kapp Professor of Law
Case Western Reserve University
School of Law

Harold J. Krent
Interim Dean and Professor
Chicago-Kent College of Law

Christopher Kutz
Assistant Professor of Law
School of Law (Boalt Hall)
University of California at Berkeley

Maury Landsman
Clinical Professor
University of Minnesota Law School

Frederick M. Lawrence
Law Alumni Scholar and Professor
of Law
Boston University School of Law

Robert P. Lawry
Professor of Law and Director,
Center for Professional Ethics
Case Western Reserve University
School of Law

Sylvia R. Lazos
Associate Professor
University of Missouri-Columbia
School of Law

Terri LeClercq, Ph.D.
Fellow, Norman Black Professorship
in Ethical Communication in Law
University of Texas School of Law

Brant T. Lee
Associate Professor of Law
University of Akron School of Law

Brian Leiter
Charles I. Francis Professor
University of Texas School of Law

John Leubsdorf
Professor of Law
Rutgers School of Law - Newark

Sanford Levinson
University of Texas School of Law

Cynthia Crawford Lichtenstein
Professor Emerita, Boston College
School of Law
Visiting Professor, George
Washington University School of
Law

Joseph Liu
Assistant Professor
Boston College Law School

Claudio Lomnitz
Professor of History
University of Chicago

Jean Love
Martha-Ellen Tye Distinguished
Professor of Law
University of Iowa College of Law

John S. Lowe
George W. Hutchison Professor of
Energy Law
Southern Methodist University

Edmund B. Luce
Director of Graduate Programs and
Legal Writing Professor
Widener University School of Law

Carroll L. Lucht
Clinical Professor of Law

Yale Law School

Jeana L. Lungwitz
University of Texas School of Law

David Lyons
Boston University

Marko C. Maglich
Attorney, New York

Daniel Markovits
Associate Professor of Law
Yale Law School

Inga Markovits
"Friends of Jamail" Regents' Chair in Law
University of Texas

Richard Markovits
John B. Connally Chair in Law
University of Texas

Stephen Marks
Associate Dean for Academic Affairs
Boston University School of Law

Jerry L. Mashaw
Sterling Professor of Law and Management
Yale Law School

Professor Judith L. Maute
University of Oklahoma College of Law

Carolyn McAllaster
Clinical Professor of Law
Duke University School of Law

Marcia L. McCormick
Visiting Assistant Professor
Chicago-Kent College of Law

Melinda Meador
Bass, Berry, and Sims PLC
Knoxville, TN

Michael Meltsner
Visiting Professor of Law
Harvard Law School

Roy M. Mersky
Harry M. Reasoner Regents Chair in Law and Director of Research
Jamail Center for Legal Research
Tarlton Law Library
University of Texas School of Law

Frank I. Michelman
Harvard University

Alice M. Miller, J.D.
Assistant Professor of Clinical Public Health
Law and Policy Project
Columbia University School of Public Health

Jonathan Miller
Professor of Law
Southwestern University School of Law

Joseph Scott Miller
Visiting Assistant Professor of Law
Northwestern University School of Law

Elliot S. Milstein
Professor of Law
American University, Washington College of Law

JoAnne Miner
Senior Lecturer
Cornell Law School

Satish Moorthy
Coordinator, Human Rights Program
University of Chicago

Margaret Montoya
University of New Mexico School of Law
Co-President, Society of American Law Teachers

Frederick C. Moss
Associate Professor of Law
Southern Methodist University School of Law

Eleanor W. Myers
Temple University, Beasley Law School

Molly O'Brien
Associate Professor of Law
University of Akron School of Law

Paul O'Neil
Visiting Professor of Law
CUNY School of Law

J.P. Ogilvy
Associate Professor of Law
Columbus School of Law
The Catholic University of America

Diane Orentlicher
American University, Washington College of Law

Nancy K. Ota
Professor of Law
Albany Law School

Professor Daniel G. Partan
Boston University School of Law

Teresa Gotwin Phelps
Professor of Law
University of Notre Dame School of Law

Sidney Picker, Jr.
Professor of Law
Case Western Reserve University Law School

Sydelle Pittas, Esq.
Pittas/Koenig
Winchester, MA

Zygmunt J.B. Plater
Professor of Law
Boston College Law School

Nancy D. Polikoff
Professor of Law
American University, Washington College of Law

Robert J. Quinn, Esq.
Human Rights Program
University of Chicago

Vernellia R. Randall
Professor of Law
University of Dayton

Frank S. Ravitch
Visiting Associate Professor of Law
Syracuse University College of Law

Anthony F. Renzo
Assistant Professor
Vermont Law School

Judith Resnik
Arthur Liman Professor of Law
Yale Law School

Wilhelmina M. Reuben-Cooke
Professor of Law
Syracuse University College of Law

Annelise Riles
Professor of Law
Northwestern University School of Law

David W. Robertson
Professor of Law
University of Texas School of Law
Professor Mary Romero
School of Justice Studies
Arizona State University

Professor Michael Rooke-Ley
Co-President-elect, Society of American Law Teachers

Susan Rose-Ackerman
Henry R. Luce Professor of Law and Political Science
Yale Law School

Rand E. Rosenblatt
Professor of Law
Rutgers School of Law - Camden

Stephen A. Rosenbaum
Lecturer in Law
School of Law (Boalt Hall)

University of California at Berkeley

Clifford J. Rosky
Post-Graduate Research Fellow
Yale Law School

Gary Rowe
Acting Professor
University of California-Los Angeles
School of Law

Len Rubinowitz
Professor of Law
Northwestern University School of
Law

William Rubenstein
Acting Professor
University of California-Los Angeles
School of Law

David S. Rudstein
Professor of Law
Chicago-Kent College of Law

Richard Sander
Professor of Law
University of California-Los Angeles
School of Law

Jane L. Scarborough
Associate Professor of Law
Northeastern University School of
Law

Elizabeth M. Schneider
Rose L. Hoffer Professor of Law
Brooklyn Law School

Ora Schub
Associate Clinical Professor
Children and Family Justice Center
Northwestern University School of
Law

Ann Seidman
Adjunct Professor
Boston University School of Law

Robert B. Seidman
Professor Emeritus
Boston University School of Law

Jeff Selbin
Lecturer
School of Law (Boalt Hall)
University of California at Berkeley

Elisabeth Semel
Acting Clinical Professor
School of Law (Boalt Hall)
University of California at Berkeley

Ann Shalleck
Professor of Law
American University, Washington
College of Law

Julie Shapiro
Associate Professor of Law
Seattle University School of Law

Richard K. Sherwin
Professor of Law
New York Law School

Seanna Shiffrin
Professor of Law and Associate
Professor of Philosophy
University of California-Los Angeles

Steven Shiffrin
Professor of Law
Cornell University

James J. Silk
Executive Director
Orville H. Schell, Jr. Center for
International Human Rights

Yale Law School
Richard Singer
Distinguished Professor
Rutgers Law School - Camden

Professor Ronald C. Slye
Seattle University School of Law

Roy M. Sobelson
Professor of Law
Georgia State University College of
Law

Norman W. Spaulding

Acting Professor of Law
School of Law (Boalt Hall)
University of California at Berkeley

Christina Spiesel
Senior Research Associate, Yale Law School
Adjunct Professor of Law,
Quinnipiac University School of Law
And Adjunct Professor Of Law,
New York Law School

Peter J. Spiro
Professor of Law
Hofstra University Law School

Joan Steinman
Distinguished Professor of Law
Chicago-Kent College of Law

Barbara Stark
Professor of Law
University of Tennessee College of Law

Margaret Stewart
Professor of Law
Chicago-Kent School of Law

Katherine Stone
Professor of Law
Cornell Law School

Victor J. Stone
Professor Emeritus of Law
University of Illinois at Urbana-Champaign

Robert N. Strassfeld
Professor of Law
Case Western Reserve University School of Law

Peter L. Strauss
Betts Professor of Law
Columbia Law School

Beth Stephens
Associate Professor of Law
Rutgers-Camden School of Law

Ellen Y. Suni
Professor of Law
University of Missouri-Kansas City School of Law

Michael Sweeney, Esq.

Eleanor Swift
Professor of Law
School of Law (Boalt Hall)
University of California at Berkeley

David Taylor
Professor of Law
Northern Illinois College of Law

Kim Taylor-Thompson
Professor, New York University School of Law

Peter R. Teachout
Professor of Constitutional Law
Vermont Law School

Harry F. Tepker
Calvert Chair of Law and Liberty and Professor of Law
University of Oklahoma

Beth Thornburg
Professor of Law
Dedman School of Law
Southern Methodist University

Lance Tibbles
Professor of Law
Capital University Law School

Mark Tushnet
Georgetown University Law Center

Kathleen Waits
Associate Professor
University of Tulsa College of Law

Neil Vidner
Duke University Law School

Joan Vogel
Professor of Law
Vermont Law School

Rhonda Wasserman
Professor of Law
University of Pittsburgh School of Law

Mark Weber
Professor of Law
DePaul University College of Law

Harry H. Wellington
Sterling Professor of Law Emeritus,
Yale Law School
Professor of Law, New York Law School

Carwina Weng
Assistant Clinical Professor
Boston College Law School

Jamison Wilcox
Associate Professor
Quinnipiac University School of Law

Cynthia Williams
Associate Professor
University of Illinois College of Law
and
Visiting Professor Fordham
University Law School

Verna Williams
Assistant Professor of Law
University of Cincinnati College of Law

Harvey Wingo
Professor Emeritus of Law
Southern Methodist University

Steven L. Winter
Professor of Law
Brooklyn Law School

Zipporah B. Wiseman
Thomas H. Law Centennial
Professor of Law
University of Texas

Stephen Wizner
William O. Douglas Clinical
Professor of Law
Yale Law School

Barbara Bader Aldave
Loran L. Stewart Professor of Law
University of Oregon

Carolyn Patty Blum
Clinical Professor of Law and
Director, International Human
Rights Law Clinic
School of Law (Boalt Hall)
University of California at Berkeley

Anthony D'Amato
Leighton Professor of Law
Northwestern University School of Law

Nancy Ehrenreich
Associate Professor of Law
University of Denver College of Law

Maryam Elahi, Esq.
Director, Human Rights Program
Trinity College

John Hart Ely
Richard Hausler Professor of Law
University of Miami (formerly Dean,
Stanford Law School)

Elizabeth Lutes Hillman
Assistant Professor of Law
Rutgers School of Law - Camden

Henry T. King, Jr.
Professor
Case Western Reserve University
School of Law

Kit Kinports
Professor
University of Illinois College of Law

Professor Martin Levy
Thurgood Marshall School of Law

Garth Meintjes
Associate Director, Center for Civil
and Human Right
University of Notre Dame School of
Law

Dawn Clark Netsch
Professor of Law Emerita
Northwestern University School of Law

Edward D. Ohlbaum
Professor of Law
Temple University

Tamara Piety
Visiting Assistant Professor
University of Tulsa College of Law

Judith Royster
Professor of Law
University of Tulsa

Herman Schwartz
American University, Washington College of Law

Riva Siegel
Nicholas deB. Katzenbach Professor of Law
Yale Law School

Connie J. Sipe, Esq.
Sitka, Alaska

Aviam Soifer
Boston College Law School

Robert Solomon
Clinical Professor (Adjunct) of Law
Yale Law School

Cynthia Soohoo
Director, Bringing Human Rights Home
Human Rights Institute at Columbia Law School

David Abraham
Professor
University of Miami School of Law

Roger Abrams
Dean and Richardson Professor of Law
Northeastern University School of Law

Kathryn Abrams
Professor of Law, University of California-Berkeley School of Law
Professor of Law, Cornell Law School

John Adler
Professor of Law
University of San Francisco School of Law

Catherine Adcock Admay
Lecturer of Law, Director IDC
Duke Law School

Lee A. Albert
State University of New York, University at Buffalo School of Law

Richard Alderman
University of Houston Law Center

Ted Alevizos
Professor of Law, Retired
Suffolk University Law School

George Alexander
Professor of Law
Santa Clara University Law School

James J. Alfini
Professor of Law
Northern Illinois University College of Law

Reginald Alleyne
Visiting Professor of Law
Boston College Law School

Jose Alvarez
Professor of Law
Columbia Law School

Anthony G. Amsterdam

Judge Edward M. Weinfeld
Professor of Law
New York University School of Law

Alexis Anderson
Visiting Associate Clinical Professor

Boston College Law School

Claudia Angelos
Professor of Clinical Law
New York University School of Law

Amy Applegate
Clinical Associate Professor
Indiana University School of Law

Susan Appleton
Associate Dean of Faculty
Lemma Barkeloo & Phoebe Couzins
Professor of Law
Washington University School of
Law in St. Louis

Marianne Artusio
Associate Professor of Law
Jacob D. Fuchsberg Law Center,
Touro College

Sameer M. Ashar
Acting Assistant Professor of
Clinical Law
New York University School of Law

Frank Askin
Professor
Rutgers School of Law

Hope Babcock
Professor of Law
Georgetown University Law Center

James Francis Bailey, III
Indiana University School of Law

Katherine Baker
Associate Professor of Law
Chicago-Kent College of Law

Brook K. Baker
Professor of Law
Northeastern University School of
Law

C. Edwin Baker
Professor of Law
University of Pennsylvania Law
School

Milner Ball
Caldwell Professor of Constitutional
Law
University of Georgia School of Law

Beverly Balos
Clinical Professor of Law
University of Minnesota Law School

Sylvia Barboza
Fenwick & West, LLP

John J. Barcelo
William Nelson Cromwell Professor
of International and Comparative
Law
Cornell Law School

Kimberly Barlow
UCLA School of Law

Robert Batey
Professor of Law
Stetson University College of Law

Jeffrey Bauman
Professor
Georgetown University Law Center

Loftus E. Becker, Jr.
University of Connecticut School of
Law

Gordon J. Beggs
Staff Attorney, Employment Law
Clinic
Cleveland-Marshall College of Law,
Cleveland State University

Theresa M. Beiner
Professor of Law
UALR William H. Bowen School of
Law

G. Andrew Benjamin
Affiliate Professor of Law and
Clinical Professor of Medicine and
Director, Parenting
Evaluation/Training Program
University of Washington School of
Law

Sue Bentch
Clinical Professor of Law
St. Mary's University School of Law

Laura Berend
Professor of Law
University of San Diego School of Law

Marilyn Berger
Professor of Law
Seattle University School of Law

Bethany R. Berger
Research Professor of Law
University of Connecticut School of Law

Mary Berkheiser
Associate Professor and Director of Clinical Programs
University of Nevada Las Vegas, William S. Boyd School of Law

Paul Schiff Berman
Associate Professor of Law
University of Connecticut School of Law

Susan Bitensky
Professor of Law
Michigan State University - Detroit College of Law

Brian Bix
Frederick W. Thomas Professor for the Interdisciplinary Study of Law and Language
University of Minnesota Law School

M. Gregg Bloche
Professor of Law
Georgetown University Law Center

Michael Blum
Professor of Law
Lewis and Clark Law School

Eric Blumenson
Professor
Suffolk University Law School

Charles S. Bobis
Professor of Law
St. John's University School of Law

Kenneth Bobroff
Associate Professor of Law
University of New Mexico School of Law

Jocelyne Boissonneault
Fenwick & West, LLP

Danny Bradlow
Professor of Law
American University, Washington College of Law

Deborah L. Brake
Assistant Professor of Law
University of Pittsburgh School of Law

Melinda Branscomb
Associate Professor of Law
Seattle University School of Law

Jean Braucher
Roger Henderson Professor of Law
University of Arizona, James E. Rogers College of Law

Lisa Brodoff
Assisant Clinical Professor
Seattle University School of Law

Darryl Brown
Professor
Washington & Lee University School of Law

Robert Brownstone
Fenwick & West, LLP

Jerome Bruner
University Professor and Research Professor of Psychology
New York University School Law

Susan Bryant
City University of New York School of Law

Ann M. Burkhart
Professor of Law
University of Minnesota Law School

John M. Burkoff
Associate Dean & Professor of Law
University of Pittsburgh School of Law

Sarah E. Burns
Professor of Clinical Law
New York University School of Law

Paul Cain
Internship Clinical Fellow
University of Denver College of Law

Janet M. Calvo
City University of New York School of Law

Stacy Caplow
Professor of Law and Director of Clinical Programs
Brooklyn Law School

David Carney
Instructor of Law
Case Western Reserve University School of Law

Kenneth Casebeer
University of Miami School of Law

Francis Catania
Associate Professor of Law
Widener University School of Law

David L. Chambers
Professor of Law
University of Michigan Law School

Howard Chapman
Professor of Law
Chicago-Kent College of Law

Erwin Chemerinsky
Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science
University of Southern California, The Law School

Margaret Chon
Seattle University School of Law

Richard H. Chused
Professor of Law
Georgetown University Law Center.

Karin Ciano
Lawyering Program
New York University School of Law

Donald C. Clarke
Professor of Law
University of Washington School of Law

Jerome A. Cohen
Professor of Law
New York University School Law

Laura Cohen
Visiting Assistant Clinical Professor of Law
Rutgers Law School

William Cohen
C. Wendell and Edith M. Carlsmith Professor Emeritus
Stanford Law School

Marjorie Cohn
Associate Professor of Law
Thomas Jefferson School of Law

Donna Coker
Professor
University of Miami School of Law

Doug Colbert
Professor
University of Maryland School of Law

Rodger R. Cole, Esq.
Fenwick & West, LLP

Nancy Cook
Director, Clinical Law Programs
Cornell Law School

Peggy Cooper Davis

Shad Professor of Law
New York University School of Law

Lois Cox
Clinical Professor of Law
University of Iowa College of Law

Randall Coyne
Professor
University of Oklahoma College of Law

Phyllis Crocker
Associate Professor of Law
Cleveland-Marshall College of Law,
Cleveland State University

Cathy E. Crosson
Indiana University School of Law

Melissa Crow
International Human Rights Law Clinic
American University, Washington College of Law

John Culhane
Professor of Law
Widener University School of Law

E. Cunningham
Howard University School of Law

Mary C. Daly
Professor of Law
Fordham University School of Law

Erin Daly
Associate Professor of Law
Widener University School of Law

Margaret Danielson
Clinical Assistant Professor
University of Wisconsin Law School

Ellen Dannin
Professor of Law
California Western School of Law

Jacqueline Daunt
Fenwick & West, LLP

Julie Davies
Professor of Law
University of the Pacific, McGeorge School of Law

Michael Davis
Professor of Law
Cleveland-Marshall College of Law,
Cleveland State University

Peter Davis
Associate Professor of Law
Jacob D. Fuchsberg Law Center,
Touro College

Toni Hahn Davis
Associate Dean
Yale Law School

Kim Dayton
University of Kansas School of Law

Connie de la Vega
Professor of Law
University of San Francisco

Susan DeJarnatt
Associate Professor
Temple University, Beasley School of Law

John Delaney
Associate Professor (retired)
City University of New York School of Law

John Denvir
Professor of Law
University of San Francisco School of Law

Daniel H. Derby
Professor and Director of International Programs
Jacob D. Fuchsberg Law Center,
Touro College

Laura Dickinson
Associate Professor of Law
University of Connecticut School of Law

Matthew Diller
Fordham University School of Law

Jane Dolkart
Associate Professor of Law
Southern Methodist University,
Dedmun School of Law

Sharon Dolovich
Acting Professor of Law
UCLA School of Law
David Dorfman
Assistant Professor
Pace University School of Law

Mary L. Dudziak
Judge Edward J. and Ruey L.
Guirado Professor of Law and
History
University of Southern California,
The Law School

Jill Elijah
Clinical Instructor
Criminal Justice Institute, Harvard
Law School

Russell Engler
New England School of Law

Peter Enrich
Professor of Law
Northeastern University School of
Law

Deborah Epstein
Associate Professor of Law
Georgetown University Law Center

Peter Erlinder
Professor
William Mitchell College of Law

Timothy H. Everett
Clinical Professor of Law
University of Connecticut School of
Law

Mary Jo Eyster
Clinical Associate Professor
Brooklyn Law School

Bryan K. Fair
Thomas E. Skinner Professor of Law
The University of Alabama School of
Law

Richard Falk
Albert G. Milbank Professor of
International Law and Practice
Emeritus
Princeton University

Christine Farley
Assistant Professor
American University, Washington
College of Law

Stephanie Farrior
Professor of Law
Pennsylvania State University,
Dickinson School of Law

Katherine Federle
Associate Professor of Law and
Director Justice for Children Project
Michael E. Moritz College of Law,
The Ohio State University

Marvin Fein
Professor of Law
University of Pittsburgh School of
Law

Heidi Feldman
Professor of Law
Georgetown University Law Center

Mary Louise Fellows
Professor of Law
University of Minnesota Law School

Todd D. Fernow
Professor of Law
University of Connecticut School of
Law

Rebecca A.E. Fewkes
Fenwick & West, LLP

Keith A. Findley
Clinical Associate Professor
University of Wisconsin Law School

Martha Albertson Fineman
Cornell University School of Law

Nancy Fink
Brooklyn Law School

Lucinda Finley
Frank Raichle Professor of Law
State University of New York,
University at Buffalo School of Law

Linda E. Fisher
Associate Professor of Law
Seton Hall University School of Law

James Fleming
Professor of Law
Fordham University School of Law

George P. Fletcher
Cardozo Professor of Jurisprudence
Columbia Law School

John Flynn
Professor of Law
Northeastern University School of Law

Denise Fort
Professor of Law
University of New Mexico School of Law

Cyril A. Fox
Professor of Law
University of Pittsburgh Law School

Darren Franklin
Fenwick & West, LLP

Ann E. Freedman
Associate Professor of Law
Rutgers Law School - Camden

Niels W. Frenzen
Clinical Assistant Professor of Law
University of Southern California,
The Law School

Clark Freshman
Professor
University of Miami School of Law

Bruce W. Frier
H.K. Ransom Professor of Law
University of Michigan Law School

Lawrence Frolik
Professor of Law
University of Pittsburgh Law School

Michael Froomkin
University of Miami School of Law
Maryellen Fullerton
Professor of Law
Brooklyn Law School

Marc Galanter
Professor of Law
University of Wisconsin Law School

Mary Gale
Professor of Law
Whittier Law School

William Galloway
Legal Writing Instructor
Seattle University School of Law

Paula Galowitz
Clinical Professor of Law
New York University School of Law

David Garland
Arthur T. Vanderbilt Professor of Law
New York University School of Law

Eileen Gauna
Professor of Law
Southwestern University School of Law

Frederick Gedicks
Professor of Law
Brigham Young University Law School

David H. Getches
Raphael J. Moses Professor of
Natural Resources Law
University of Colorado School of Law

Franklin E. Gill
Research Professor
University of New Mexico School of Law

Brian Glick
Associate Clinical Professor of Law
Fordham University School of Law

Pamela Goldberg
Associate Professor of Law
City University of New York School of Law

Toby Golick
Clinical Professor of Law and
Director, Bet Tzedek Legal Services Clinic
Benjamin N. Cardozo School of Law

Victor M. Goode
Associate Professor of Law
City University of New York School of Law

Michael H. Gottesman
Professor of Law
Georgetown University Law Center

William Gould, IV
Charles A. Beardsley Professor of Law
Stanford Law School

Judith Greenberg
New England School of Law

Edwin Greenebaum
Professor Emeritus of Law
Indiana University School of Law-Bloomington

Leigh Hunt Greenhaw
Lecturer in Law
Washington University School of Law in St. Louis

Lawrence Grosberg
Professor of Law
New York Law School

Samuel Gross
Professor of Law
University of Michigan Law School

Martin Guggenheim
Professor of Clinical Law
New York University School of Law

Phoebe Haddon
Professor of Law
James E. Beasley School of Law,
Temple University

Daniel Halperin
Professor of Law
Harvard Law School

Gail Hammer
Family Law/Domestic Violence
Project Director and Visiting
Professor of Clinical Law
Gonzaga University School of Law

Henry Hansmann
Sam Harris Professor of Law
Yale Law School

Frances Hardy
Clinical Associate Professor
Indiana University School of Law

Sidney L. Harring
Professor of Law
City University of New York School of Law

Hendrik Hartog
Class of 1921 Bicentennial Professor of the History of American Law and Liberty
Princeton University

Mark J. Heyrman
Clinical Professor of Law
University of Chicago Law School

Craig Hoffman
Associate Professor of Law
Georgetown University Law Center

Candice Hoke
Cleveland-Marshall College of Law,
Cleveland State University

Wallace Holohan
Clinical Professor of Law
Northeastern University School of Law

Wythe Holt
University Research Professor of Law
University of Alabama School of Law

Joan W. Howarth
Professor of Law
Boyd School of Law, University of Nevada

Charlotte Ann Hughart
Clinical Professor of Law
Texas Wesleyan University School of Law

Marsha Huie
Professor of Law
St. Mary's University School of Law

Sarah Ignatius
Lecturer
Boston College Law School

Suzanne H. Jackson
Clinical Fellow
University of Baltimore Family Law Clinic

Ellen Moses James
Professor of Law, Retired
City University of New York School of Law

Peter Jaszi
Professor of Law
American University, Washington College of Law

Emma Jordan
Professor of Law
Georgetown University Law Center

Peter Joy
Professor
Washington University School of Law in St. Louis

Jose Roberto Juarez, Jr.
Visiting Professor of Law
University of Oregon School of Law

Ann Juergens
Professor of Law
William Mitchell College of Law

Daniel Kanstroom
Associate Clinical Professor of Law
Boston College Law School

Leonard Kaplan
Mortimer Jackson Professor of Law
University of Wisconsin School of Law

Ratna Kapur
Global Visiting Professor of Law
New York University School of Law

Alice Kaswan
Associate Professor
University of San Francisco School of Law

Stan Katz
Professor
Woodrow Wilson School, Princeton University

Gregory Keating
Professor of Law
University of Southern California, The Law School

Patrick A. Keenan
Professor of Law
University of Detroit Mercy

Walter Kendall
John Marshall Law School

Duncan Kennedy
Professor
Harvard Law School

Linda Kerber

Lecturer in Law and May Brodeck Professor in the Liberal Arts and Sciences
University of Iowa

Pauline Kim
Professor of Law
Washington University School of Law in St. Louis

Patricia King
Professor
Georgetown University Law Center

Karl Klare
Professor
Northwestern University School of Law

Ruth Kovnat
Professor of Law
University of New Mexico School of Law

Stanton D. Krauss
Professor
Quinnipiac University School of Law

Ellen Kreitzberg
Associate Professor of Law
Santa Clara University Law School

Stefan H. Krieger
Professor of Law
Hofstra University School of Law

Richard Kuhns
Professor of Law
Washington University

Bailey Kuklin
Brooklyn Law School

Madeleine Kurtz
Professor of Law
New York University School of Law

James A. Kushner
Professor of Law
Southwestern University School of Law

Nickolas J. Kyser
Associate Professor of Law
University of Detroit Mercy

D. Bruce La Pierre
Washington University School of Law in St. Louis

Maivân Clech Lâm
Professor
American University, Washington College of Law

Heidi Lamb
Fenwick & West, LLP

Karen A. Lash
Associate Dean
University of Southern California, The Law School

Kenneth Lasson
University of Baltimore Law School

Stephen Latham
Assistant Professor of Law
Quinnipiac University School of Law

Sylvia Law
Elizabeth K. Dollard Professor of Law, Medicine and Psychiatry
New York University School of Law

Lydia Lazar
Assistant Dean for International Law and Policy Development
Chicago-Kent College of Law

Donna H. Lee
Acting Assistant Professor
New York University School of Law

Lisa Lerman
Professor of Law and Director, Law and Public Policy Program
Catholic University Law School

Alan Lerner
Practice Professor of Law

University of Pennsylvania Law School

Howard Lesnick
Jefferson B. Fordham Professor of Law
University of Pennsylvania Law School

Leslie C. Levin
Professor of Law
University of Connecticut School of Law

Alan Levine
Levine & Mandelbaum

Jerome Levinson
Distinguished Lawyer in Residence
American University, Washington College of Law

Degna P. Levister
Associate Professor of Law
City University of New York School of Law

Suzanne J. Levitt
Professor of Law
Drake Law School

L. Hope Lewis
Professor of Law
Northeastern University School of Law

Raven Lidman
Clinical Professor of Law
Seattle University School of Law

Richard Litvin
Associate Professor of Law
Quinnipiac University School of Law

Jules Lobel
Professor of Law
University of Pittsburgh Law School

Stephen Loffredo
Associate Professor of Law
City University of New York School of Law

Antoinette Sedillo Lopez
Professor of Law
University of New Mexico School of Law

Gerald P. López
Professor of Law
New York University School Law

David Luban
Frederick Haas Professor of Law and Philosophy
Georgetown University Law Center

William V. Luneburg
Professor of Law
University of Pittsburgh School of Law

Mary Lynch
Clinical Professor of Law
Albany Law School

Beth Lyon
Assistant Professor of Law and Director, Farmworker Legal Aid Clinic
Villanova University School of Law

Hugh MacGill
Dean Emeritus and Professor of Law
University of Connecticut School of Law

Holly Maguigan
Professor of Clinical Law
New York University School of Law

Martha Mahoney
Professor of Law
University of Miami School of Law

Karl Manheim
Professor of Law
Loyola Law School

Lynn Marcus

Director of the Immigration Law
Clinic and Assistant Adjunct
Professor of Law
James E. Rogers College of Law,
University of Arizona

Nancy Marder
Chicago-Kent College of Law

Susan M. Marsh
Fenwick & West, LLP

Elizabeth Phillips Marsh
Professor of Law
Quinnipiac University School of
Law

Lynn Martell
Clinical Professor of Law
New York University School of Law

Peter W. Martin
Jane M.G. Foster Professor of Law
Cornell Law School

Alfred D. Mathewson
Associate Dean & Professor
University of New Mexico School of
Law

Mari Matsuda
Professor
Georgetown University Law Center

James R. Maxeiner
Visiting Professor of Law
Jacob D. Fuchsberg Law Center,
Touro College

Claire C. Robinson May
Lecturer in Legal Writing, Research
and Advocacy
Cleveland-Marshall College of Law,
Cleveland State University

Linda McClain
Professor of Law
Hofstra University School of Law

Susan McClellan
Legal Writing Instructor
Seattle University School of Law

Martha McCluskey
State University of New York,
University at Buffalo School of Law

Elizabeth McCormick
William R. Davis Clinical Teaching
Fellow
University of Connecticut School of
Law

Patricia McCoy
Professor of Law
Cleveland-Marshall College of Law,
Cleveland State University

Susan E. McGuigan
Associate Dean of Student Services
Whittier Law School

Joyce McIntyre
Family Defense Clinic
New York University School of Law

Robert F. Meagher
Emeritus Professor in International
Law
Fletcher School of Law and
Diplomacy, Tufts University

Alan Meisel
Dickie, McCamey & Chilcote
Professor of Bioethics and Professor
of Law
University of Pittsburgh Law School

Miguel Mendez
Adelbert H. Sweet Professor of Law
Stanford Law School

Naomi Mezey
Associate Professor of Law
Georgetown University Law Center

Binny Miller
Professor of Law
American University, Washington
College of Law

David W. Miller
Professor of Law

University of the Pacific, McGeorge School of Law

Chester L. Mirsky
New York University School of Law

Mary Harter Mitchell
Indiana University School of Law-Indianapolis

Jennifer Moore
Associate Professor of Law
University of New Mexico School of Law

David A. Moran
Assistant Professor of Law
Wayne State University Law School

Nancy Morawetz
Professor of Clinical Law
New York University School of Law

Ziyad Motala
Professor of Law and Director Graduate Studies
Howard University School of Law

Suzanne Mounts
Professor
University of San Francisco School of Law

Mary-Beth Moylan
University of the Pacific, McGeorge School of Law

Ann Moynihan
Fordham University School of Law

Millard Murphy
Lecturer at Law
University of California, Davis, King Hall School of Law

Aaron Myers
Fenwick & West, LLP

Dorothy Nelkin
New York University School Law

Joel Newman

Wake Forest Law School
Clayton Noble
Attorney and Counselor at Law
Fenwick & West LLP

Robert L. Oakley
Director of the Law Library and Professor of Law
Georgetown University Law Center

Kimberly E. O'Leary
Associate Professor of Law
Thomas Cooley Law School

Kelly Browe Olson
Visiting Professor and Director of the Mediation Clinic
University of Arkansas at Little Rock Bowen School of Law

Mark S. Ostrau
Fenwick & West, LLP

Joan O'Sullivan
University of Maryland School of Law

Richard Ottinger
Dean Emeritus
Pace Law School

Laura Owen
University of Houston Law Center

Calvin Pang
Visiting Professor of Law
University of Minnesota Law School

Patrick Parenteau
Professor of Law
Vermont Law School

Margaret L. Paris
Associate Professor
University of Oregon School of Law

Inga L. Parsons
New York University School of Law

Elizabeth Patterson
Associate Professor of Law
Georgetown University Law Center

Jeremy Paul
Professor of Law
University of Connecticut School of Law

Rudolph Peritz
Professor of Law
New York Law School

Michael L. Perlin
Professor of Law
New York Law School

Henry Perritt
Dean and Professor of Law
Chicago-Kent College of Law

Michael J. Perry
University Distinguished Chair in Law
Wake Forest University School of Law

Tram Phi
Fenwick & West, LLP

Jed Phillips
Fenwick & West, LLP

Michele Pistone
Assistant Professor and Director of Clinical Programs
Villanova University School of Law

Ellen S. Podgor
Professor of Law
Georgia State University College of Law

Geri Pomerantz
Visiting Professor
Albany Law School

Mary Prosser
Deputy Director, Criminal Justice Institute and Lecturer at Law
Harvard Law School

William Quigley
Professor of Law
Loyola University New Orleans

Margaret Radin
William Benjamin Scott and Luna M. Scott Professor of Law and Director, Program in
Law, Science and Technology
Stanford Law School

Noel Ragsdale
Clinical Professor of Law
University of Southern California, The Law School

Aparna Rajagopal
Fenwick & West, LLP

Elizabeth Rapaport
Professor of Law
University of New Mexico School of Law

Martha Rayner
Associate Clinical Professor of Law
Fordham University School of Law

Victoria Read
Clinical Instructor
Harvard Law School

Peter L. Reich
Professor of Law
Whittier Law School

Allison Rice
Duke University Law School

Robert Rich
Professor of Law and Political Science
University of Illinois College of Law

Judith Ritter
Professor
Widener University School of Law

Ira P. Robbins
Professor of Law
American University, Washington College of Law

Joel Rogers
Professor

University of Wisconsin Law School

Florence Wagman Roisman
Professor of Law and Paul Beam Fellow
Indiana University School of Law–Indianapolis

Richard A. Rosen
Professor of Law and Senior Associate Dean
University of North Carolina School of Law

Howard Rosenberg
Professor of Law
University of Denver College of Law

S. James Rosenfeld
Visiting Professor of Clinical Law
Seattle University School of Law

Joy Rosenthal McIntyre
Attorney, Family Defense Clinic
New York University School Law

Thomas Ross
Professor of Law
University of Pittsburgh Law School

Merrick T. Rossein
Professor of Law
City University of New York School of Law

Tanina Rostain
Professor of Law
New York Law School

Patricia Roth
Director, Law Alumni Affairs
Georgetown University Law Center

James Rowan
Northeastern University School of Law

Michael H. Rubin
Fenwick & West, LLP

David Rudovsky
University of Pennsylvania Law School

Teema Ruskola
Assistant Professor of Law
American University, Washington College of Law

Susan Rutberg
Professor
Golden Gate University School of Law

Leila Sadat
Professor of Law
Washington University School of Law in St. Louis

Leslie Salzman
Clinical Professor of Law
Benjamin N. Cardozo School of Law

Daniel Schaffer
Professor of Law
Northeastern University School of Law

Michael P. Scharf
Professor of Law and Director of the Center for International Law and Policy
New England School of Law

Barbara A. Schatz
Director of Clinical Programs
Columbia Law School

George Schatzki
Professor of Law
Arizona State University College of Law

Anne Schroth
Clinical Assistant Professor
University of Michigan Law School

Stephen J. Schulhofer
Professor of Law
New York University School of Law

Rob Schwartz
Professor of Law

University of New Mexico School of Law

Bettie Scott
Associate Professor
City University of New York School of Law

Anthony J. Sebok
Professor of Law
Brooklyn Law School

Robert A. Sedler
Distinguished Professor of Law and Gibbs Chair in Civil Rights and Civil Liberties
Wayne State University Law School

Butler Shaffer
Professor of Law
Southwestern University School of Law

Tracy R. Shapiro
Fenwick & West, LLP

Carole Shapiro
Professor of Legal Methods
Jacob D. Fuchsberg Law Center, Touro College

Karen Shatzkin
Shatzkin & Mayer, P.C.

Katherine C. Sheehan
Southwestern University School of Law

Jeffrey Sherman
Professor of Law
Chicago-Kent College of Law

Belinda Sifford
Visiting Professor
Vermont Law School

Marjorie A. Silver
Professor of Law
Jacob D. Fuchsberg Law Center, Touro College

Marcella Silverman
Associate Clinical Professor of Law
Fordham University School of Law

Andrew Silverman
Joseph M. Livermore Professor of Law & Director, Clinical Programs
University of Arizona, James E. Rogers College of Law

Eileen Silverstein
Zephaniah Swift Professor of Law
University of Connecticut School of Law

Dan Simon
Associate Professor
University of Southern California, The Law School

David Skover
Professor of Law
Seattle University School of Law

Cindy R. Slane
Assistant Clinical Professor of Law & Director of Field Placement Programs
Quinnipiac University School of Law

Lloyd Snyder
Professor of Law
Cleveland-Marshall College of Law, Cleveland State University

Gemma Solimene
Clinical Associate Professor of Law
Fordham University School of Law

Jeff Sovern
Professor of Law
St. John's University School of Law

Girardeau Spann
Professor of Law
Georgetown University Law Center

Mary Spector
Associate Professor of Law
Southern Methodist University, Dedmun School of Law

Emily A. Spieler
Professor
West Virginia University College of Law, U.S. Fulbright Scholar Fall 2001, University College Cork, Ireland

Theodore St. Antoine
Degan Professor Emeritus of Law
University of Michigan Law School

James Stark
Professor of Law
University of Connecticut School of Law

Andrej Starkis
Assistant Professor
Massachusetts School of Law

Jean R. Sternlight
John D. Lawson Professor of Law
University of Missouri-Columbia School of Law

June Stewart
Associate Professor and Library Director
Gonzaga University School of Law

Randolf N. Stone
Clinical Professor of Law
University of Chicago Law School

Irwin P. Stotzky
Professor of Law & Director, Center for the Study of Human Rights
University of Miami School of Law

Kelly Strader
Professor of Law
Southwestern University School of Law

John Strait
Associate Professor
Seattle University School of Law

George Strickler, Jr.
Tulane Law School

Nadine Strossen
Professor of Law
New York Law School

Linda Sugin
Visiting Professor, NYU School of Law
Associate Professor, Fordham University School of Law

Susan D. Susman
Assistant Professor of Legal Writing
Brooklyn Law School

Brian Tamanaha
Professor of Law
St. John's University School of Law

Susan Taylor
Clinical Adjunct Professor
City University of New York School of Law

Ruti Teitel
Stiefel Professor of Comparative Law
New York Law School

Kellye Testy
Associate Professor
Seattle University School of Law

David Thomas
Clinical Professor of Law
Chicago-Kent College of Law

David Thronson
Acting Assistant Professor of Law
New York University School of Law

Victor Thuronyi
Adjunct Professor of Law
Georgetown University Law Center

Adam Thurschwell
Cleveland-Marshall College of Law, Cleveland State University

Michael E. Tigar
Professor of Law
American University, Washington College of Law

Margaret A. Tonon
Dir. for Student Affairs and Clinical Supervisor
UM School of Law

Paul Tractenberg
Board of Governors Distinguished Service Professor and Alfred C. Clapp Distinguished Public Service Professor of Law
Rutgers Law School - Newark

Dr. Martha Traylor
Professor Emerita
Seton Hall University School of Law

Melissa C. Trousdale
Fenwick & West, LLP

Gerald Uelmen
Professor of Law
Santa Clara University School of Law

Stephen Utz
Professor of Law
University of Connecticut School of Law

William Van Alstyne
Perkins Professor of Constitutional Law
Duke University Law School

Dominick Vetri
Professor of Law
University of Oregon School of Law

Valorie Vojdik
Assistant Professor
Western New England College, School of Law

Adrienne Volenik
Associate Clinical Professor of Law
T.C. Williams School of Law, University of Richmond

Leti Volp
Associate Professor
American University, Washington College of Law

Rachel Vorspan
Associate Professor
Fordham University School of Law

Elaine Wallace
Fenwick & West, LLP

Judith Wegner
Professor of Law
University of North Carolina

Mark E. Weinstein
Associate Professor of Business and Law
University of Southern California, The Law School

David Weissbrodt
Fredrikson and Byron Professor of Law
University of Minnesota Law School

Deborah Weissman
Associate Professor of Law
University of North Carolina School of Law

Catherine Wells
Professor of Law
Boston College Law School

Stefanie Wen
Fenwick & West, LLP

Marianne Wesson
Professor and Wolf-Nichol Fellow
University of Colorado Law School

Robert Westley
Associate Professor of Law
Tulane Law School

Carter White
Lecturer at Law
University of California at Davis, King Hall School of Law

William M. Wiecek
Congdon Professor of Public Law
Maxwell School of Law Syracuse University

Philip Wile
Professor
University of the Pacific, McGeorge School of Law

Carolyn Wilkes Kaas
Associate Professor of Law and Director of Clinical Skills
Quinnipiac University School of Law

Joan Williams
Professor of Law and Director, Program on Gender, Work and Family
American University, Washington College of Law

Gary Williams
Professor of Law
Loyola Law School

Lucy A. Williams
Professor of Law
Northeastern University School of Law

Richard J. Wilson
American University, Washington College of Law

Ken Wing
Professor of Law
Seattle University School of Law

Peter Winship
Professor of Law
Southern Methodist University, Dedmun School of Law

David Wippman
Professor of Law
Cornell Law School

Michael Wishnie
Associate Professor of Clinical Law
New York University School of Law

Mark E. Wojcik
Professor of Law
The John Marshall Law School

Karen Worthington
Director, Barton Child Law & Policy Clinic
Emory University School of Law

Theresa Wright
Clinical Professor
Northwestern School of Law of Lewis and Clark College

Jennifer Wright
Assistant Professor of Law and Director, Clinical Law Program
Williamette University College of Law

David Yamada
Professor of Law
Suffolk University Law School

George Yeannakis
Visiting Clinical Professor of Law
Seattle University School of Law

Mary Zanolli Natkin
Associate Clinical Professor
Washington and Lee University School of Law

Mitchell Zimmerman
Coordinator, Law Professors for the Rule of Law
Fenwick & West, LLP

Clifford Zimmerman
Clinical Associate Professor of Law
Northwestern University School of Law

Richard Zitrin
Director, Center for Applied Legal Ethics